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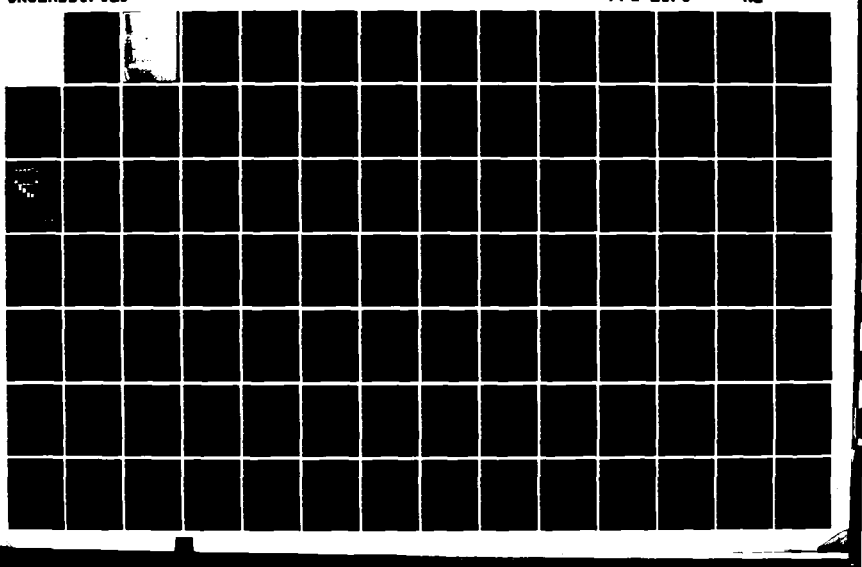

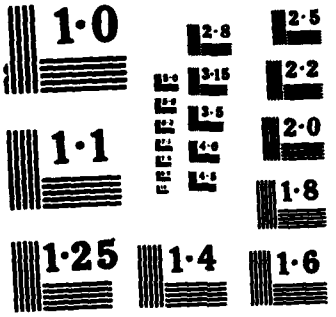

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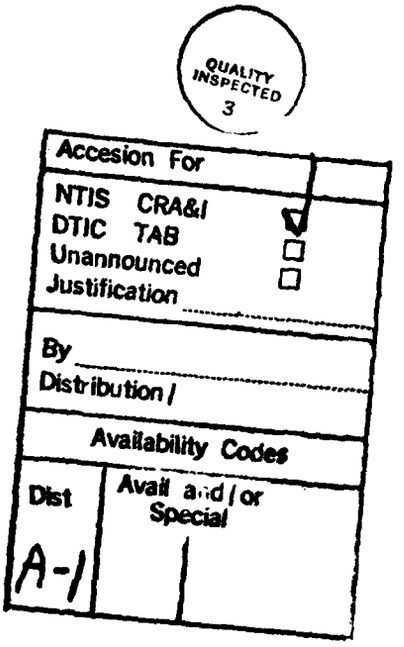
ARMY CONTINGENCY CONTRACTING



by

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The pronouns "he," "his," and "him," when used in this publication represent both the masculine and feminine genders unless otherwise specifically stated.

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EXECUTIVE SUMMARY

A. BACKGROUND. The Army's combat support (CS) and combat service support (CSS) requirements exceed the Army's capabilities based on authorized manning. The shortage can be partially alleviated through productivity gains and the Host Nation Support Program. The Logistics Civil Augmentation Program (LOGCAP) will fill the remaining shortages by utilizing contractors in CS and CSS roles during contingency operations. Facing the Army is the task of acquiring the contractors' services for performance in a hostile environment on a contingent requirement basis.

B. OBJECTIVE.

1. Determine if and to what extent current policies impact on the use of contractors to perform CSS functions in a theater of operations.

2. Determine what issues should be considered in acquisition planning for contingency contracting.

3. Determine what methods of contracting and contract provisions provide the most assurance of effective performance.

4. Determine how the Army should perform the contingency contracting function.

C. STUDY APPROACH. The study methodology consisted of a comprehensive review of the literature base and interviews with Government and contractor personnel on the subjects of international contracting, contingency planning and operations, and the use of civilians in support of military operations. From these sources, a description of the expected contract performance environment and factors to be considered by the military planner and contracting officer in the acquisition of LOGCAP support were developed. The analysis also examined the resource requirements, manning and training, for effective LOGCAP operations and local procurement during contingency operations.

D. SUMMARY AND RECOMMENDATIONS. The LOGCAP concept is viable but only if the required resources, priorities and planning are applied to the task. LOGCAP does not require streamlined procedures, only sufficiently qualified personnel to acquire and administer contracts with some unique terms and conditions. To accomplish the LOGCAP and its acquisition tasks the Department of Army must establish the priority for LOGCAP implementation and provide the necessary resources. The Office of the Deputy Chief of Staff for Logistics should take the required steps to develop a cadre of qualified (i.e., experienced as well as trained) military procurement personnel to support LOGCAP and contingency operations.

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CHAPTER I

INTRODUCTION

A. BACKGROUND.

To accomplish the Army's assigned worldwide missions would require a manned and equipped force structure far in excess of the current Army or perhaps even the capability of our nation to provide and maintain. Accordingly, Total Army Analysis (TAA) [42] is conducted to develop a program force structure which balances the mission requirements with the Department of Defense (DOD) and the Department of Army (DA) resource constraints. Indicative of the resource shortfalls experienced in this modeling process is the inclusion of a component entitled COMPO 4 in the analysis. COMPO 4 represents the unresourced, unmanned component of the Total Army which is included in the TAA along with components for the active Army and reserve forces. [42]

The COMPO 4 factor can represent any of the programmed force requirements: combat, combat support (CS) or combat service support (CSS). However, with the continuing emphasis on minimizing the Army's logistical "tail", the COMPO 4 is generally composed of CS/CSS requirements. This emphasis in combination with programmed increases in the Army's combat forces leaves the logisticians with the challenge of performing the existing plus increases in the CS/CSS mission areas with fewer troops and units.

The challenge is being partially met through productivity gains made by reorganizing support units and/or equipping the units with modern labor-saving equipment. Another portion of the shortage of CS/CSS assets is

being filled by our allies under the provisions of the Host Nation Support Program. Unfortunately, neither of these approaches is sufficient to fill the Army's CS/CSS requirements.

Another means of meeting the support shortfalls or to release existing units for other missions is by the use of contractors. In actuality, the use of contractors is not a new concept. Recent examples are the extensive contractor support used in the Viet Nam conflict, the various contractor maintenance/logistic support arrangements in use with complex weapon system systems and the use of contractor personnel to replace military and/or civil servants in commercial activities at many posts. The range of activities performed by contractors, past and present, are identical in many respects to the CS/CSS functions the Army requires but cannot meet.

B. STATEMENT OF THE PROBLEM.

The Logistics Civil Augmentation Program (LOGCAP) envisions the utilization of contractors in overseas areas during wartime to fill selected CS/CSS shortages. [35] Acquiring the services of those contractors for CS/CSS roles in contingency operations raises several issues. Foremost is the problem of developing a contract for any given operation plan while recognizing that the necessity to exercise the contract may never arise. Even so, these "contingency" contracts will still require funding for the contractor's efforts to plan and prepare for the eventuality of performance. Other corollary issues include: what CS/CSS functions the contractors will assume, where they will perform in the theater of operation, what logistical support the contractor may require and how the Army will administer the contract. Contractor support is an approach to the CS/CSS problem; however, the Army must answer many attendant questions before

the support will be generally accepted as an effective and dependable substitute for military manned units.

C. SCOPE.

The scope of the study has been limited to providing a discussion of the issues involved in contracting for LOGCAP to include identification of tasks required of the Government acquisition team and generally applicable provisions for the resulting solicitations and contracts. Since the specific language of a solicitation and contract are dependent on the actual requirement being procured and the particular major Army command's (MACOM's) acquisition policies, this study could not feasibly anticipate every eventuality the contracting officer might encounter. The research does provide the contracting officer with a framework for accomplishing the LOGCAP contracting function, a discussion of issues that the acquisition team will have to address in developing the statement of work and performing the source selection, and issues the operating forces will have to prepare for and contend with due to the use of contractors in CS/CSS roles.

D. STUDY OBJECTIVES.

The objectives of this study were to:

1. Determine if and to what extent current policies (i.e. national, DOD, DA and theater) impact on the use of contractors to perform CSS functions in a theater of operations.

2. Determine what issues should be considered in acquisition planning for contingency contracting.

3. Determine what methods of contracting and contract provisions provide the most assurance of effective performance.

4. Determine how the Army should perform the contingency contracting function.

E. METHODOLOGY.

The methodology used in research for this study primarily consisted of a comprehensive review of the literature base and interviews with government and industry personnel on the subjects of international contracting, contingency planning and operations, and the use of civilians in support of military operations. Sources for the literature base included the Defense Logistics Studies Information Exchange (DLSIE), Defense Technical Information Center (DTIC) and the US Army Combat Development Activity. Telephone and personal interviews were held with contracting and/or military operations personnel or other government officials assigned to the Office of the Special Trade Representative - President's Staff; Office of Assistant Secretary of Defense (Manpower, Installations and Logistics); US Central Command; Military Traffic Management Command; Defense Fuel Supply Center; US Army Materiel Command; Corps of Engineers; US Army Forces Command; US Army Western Command; Assistant Chief of Staff (Acquisition Management), Eighth US Army; Third US Army; US Army Logistics Command; and USA Quartermaster Center and School. Interviews were also conducted with personnel representing contractors with the capability of performing LOGCAP contracts.

Additional data presented in this study were gained from regulations, directives, instructions, handbooks, manuals, contracts, and other applicable administrative and doctrinal publications.

F. ORGANIZATION.

This report consist of six chapters. Chapter II expands on the

introduction to discuss the LOGCAP concept and its employment. Chapter III provides an overview of existing agreements and policies the Army and contractors would be subject to in a contingency operation. Chapter IV identifies the actions the requiring and contracting activities would have to perform in soliciting, awarding and administrating a contingency contract. Chapter V discusses the Army's resource and organizational structure requirements as well as other requirements necessary for providing for contractor support. The final chapter draws conclusions and provides recommendations based on the research findings.

CHAPTER II

THE ARMY CONTINGENCY CONTRACTING CONCEPT

A. INTRODUCTION.

The basic tenet of LOGCAP is that civilian contractors can be utilized in a theater of operation thereby releasing military units for other missions or filling a planning shortfall. Doing so would provide force planners and ultimately the Army component commander the means to adequately support the programmed and fielded forces. Even though LOGCAP is an Army program, the FY 1986-90 Defense Guidance directs all the Services to evaluate the concept. [53] Consequently, the Army could find itself the recepient of interservice support in a joint operation provided by contractors regardless of the Army's actions on LOGCAP.

The implement for acquiring contractual services under LOGCAP for contingency operations is the contract. The process of converting requirements into sound contracts is discussed in Chapter IV. This chapter delves into the environment in which those contracts are expected to be used, and the potential impacts on the Army, contractor and contract performance.

B. HOST NATION SUPPORT AND LOGCAP.

To this point the requirement for LOGCAP has been described in terms of the Army's internal support shortfalls. The necessity for LOGCAP has a second basis due to another support shortfall. The second factor is the shortage attributable to the assistance that would normally be provided under the host nation support program (HNS) which can neither be secured nor assured in several of the potential theaters of operation.

The similarities between HNS [30] and LOGCAP [35] are notable. Both envision the providing of assistance to US forces and organizations in

peace, transition to war and wartime. The types of support, specific CS and most CSS functions, provided under the two programs are essentially identical. Support from either source is secured by an agreement between the parties consistent with the national laws of both the host nation and the United States. The support will be required and performed in a nation other than the United States.

However, there are several significant differences between the two programs. HNS is provided by the host nation and can be civil or military in nature. LOGCAP is civilian support only and is purchased by the US Army. HNS is based on national or implementing agreements, Memoranda of Agreements, or Status of Forces Agreements (SOFA). In the case of LOGCAP, the agreement is a contract between the US and the contractor, a private firm. The HNS force in a host nation is subject only to that nation's laws. The LOGCAP contractor is subject to both the host nation's laws and customs to the extent defined by any agreement between the host and the US, and US laws. None of these differences are subtle ones and each has some degree of influence in the design, scope and performance of LOGCAP contracts and will be discussed in more detail in the next section.

As mentioned earlier, it is the inability of many potential host nations, those outside the European theater and the more developed Far Eastern nations, to provide fully for their internal military and civil support that requires the US to seek another source of support. It is this very fact the Army planner must remember when he allocates support missions for LOGCAP performance. The contractor is literally being tasked to accomplish functions the US Army and another nation are not capable and/or willing to do. There is also a high probability the contractor can

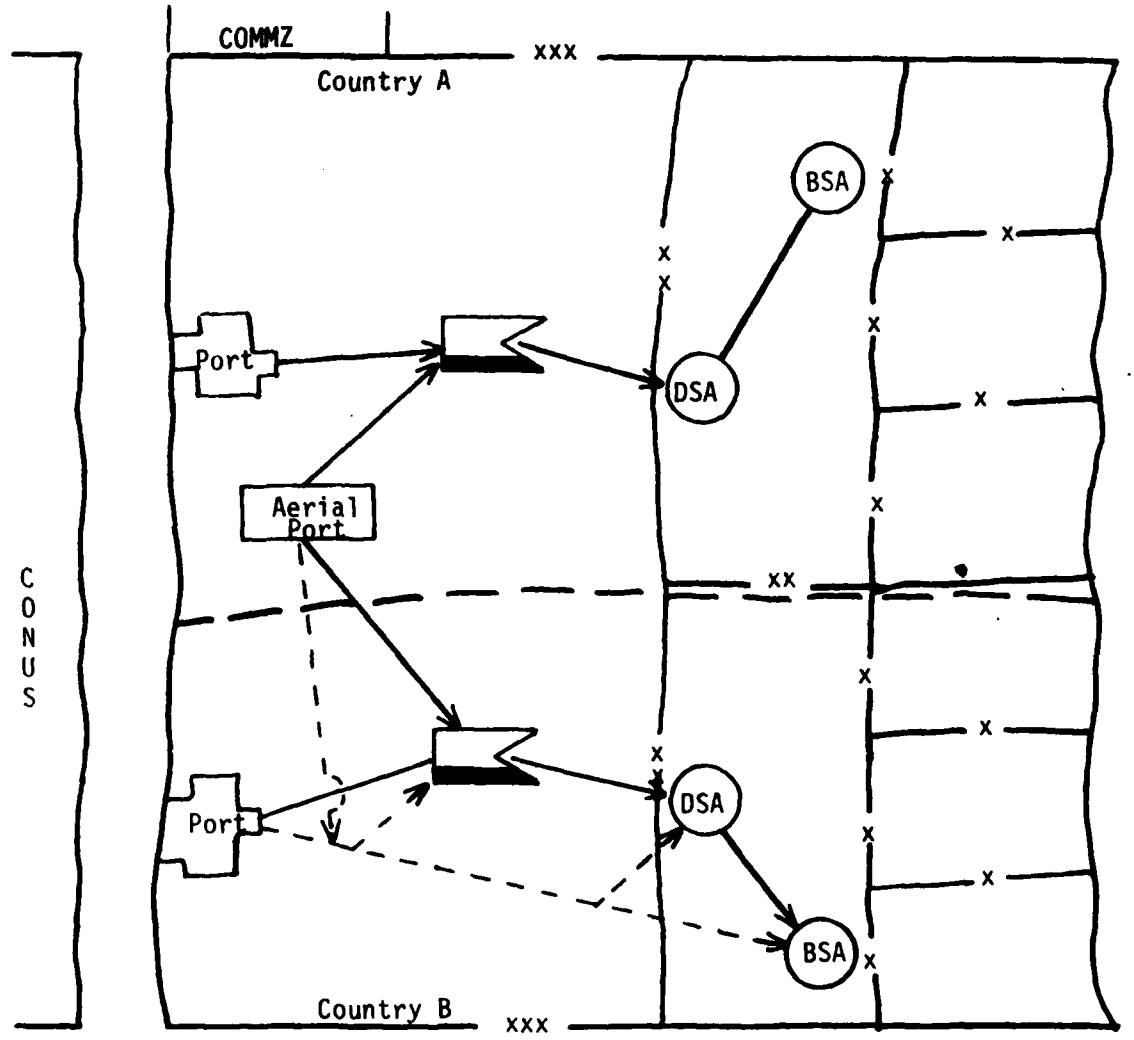
expect to perform those functions in a nation(s) whose commercial infrastructure is inadequate, both technologically and in total size, to be of any significant contribution to his efforts. Therefore, the Army should be alerted when HNS is not available, that LOGCAP in-country performance will be impacted by the same factors that preclude the host nation providing the required support.

C. THE LOGCAP ENVIRONMENT.

A major issue in the application of LOGCAP is the use of civilian contractors in an area of hostility. While the current plans for contractor employment would limit their presence to the communication zone (COMMZ) (i.e., area of theater behind the combat zone that contains the lines of communications and other activities required to support the field forces), that is no guarantee of safety. The threat obviously increases if the contractor is assigned forward support functions which are logical extensions/expansions of the COMMZ activities. However, that is only one of several issues the contracting officer and the contractor should consider in their evaluation of the theater of operations and the impacts on contract design and performance.

The theater of operations depicted in Figure 1 does not represent any specific nations or areas of the world. It does represent some of the components that would be found in a Corps-size force and their general alignment in the theater. This illustration will be used to discuss the effects of the following four factors on contractor operations.

- Modern Battlefield
- National Boundaries
- Occupied versus Allied Nations



Legend

x	Brigade	— —	National Boundary
xx	Division	———	Normal Distribution Flow
xxx	Corps		
	Corps Combat Service Unit	— — — —	Throughput
BSA	Brigade Support Area		
DSA	Division Support Area		

FIGURE 1: CONTINGENCY CONTRACTING FOR A POTENTIAL THEATER OF OPERATIONS

o Types of CS/CSS Functions Assigned to a Contractor

1. The Modern Battlefield.

While current threat doctrine emphasizes what the US Army would encounter against Warsaw Pact forces in central Europe [18], our most likely enemy in any other part of the world would either be Soviet or Soviet trained. To analyze what the contractor would have to contend with in performing in those theaters, it would only be logical to expect at a minimum the threat activities that the Soviets would employ.

A major facet of the threat doctrine is the disruption of the opposing force's rear area operations. The means of disruption are of several types and may not be Soviet-sponsored. The more obvious means are air and missile attacks or special-purpose airborne assaults on rear area installations, sabotage and the use of nuclear, biological and chemical (NBC) weapons. A non-Soviet source of disruption would be by terrorist organizations utilizing the hostilities to pursue their own purposes.

Whatever the means of disruption, the objective is to influence the conduct of the battle by degrading or eliminating the CS/CSS unit's support to the combat elements. A US military unit is able to counteract the threat influences by providing for its own defense with combat armed and trained personnel, participating in rear area protection (RAP) planning and being equipped and trained for operations in an NBC environment. With the expected lethality of the battlefield, the ultimate recovery measure is unit reconstitution which requires repair or replacement of critical equipment and replacement of critical personnel.

How does a contractor fit into this scenario? Even without suffering any type of damage or losses, the contractor would be dependent on the

Army for protection. Arming or allowing the contractor to arm his personnel would be a questionable practice at best since this would convert the personnel to the status of mercenaries as defined in Article 47 of the Geneva Convention [37]. Another issue of arming the contractor for only defensive purposes would be the provisons or lack thereof negotiated in the agreement with the host nation [15]. Obviously the contractor, being neither trained nor equipped for combat, would not be a planning asset for RAP and yet the level of protection provided to a contractor must be commensurate with the priority of the CS/CSS function performed.

The major consideration in an active NBC environment is the continuation of operations. The contractor's ability to operate under the threat of or during an actual NBC attack would require the same training, equipment and warning as any military unit providing essential support. Without all three of the aforementioned elements, the contractor would not be able to function in an contaminated sector, assist with the decontamination process or possibly, even exist to resume operations. Since NBC operations are uniquely military in nature, passive defense from them should be a logical item of Government-furnished support which an astute contractor would demand.

As for reconstituting the contractor's operation, the Army would have two choices. The contractor can be allowed an excusable delay due to an act of war and permitted to rebuild the operation or the Army can replace the contractor with a military unit assuming one is available. The contract would have to include a provision for the contractor to develop plans for the replacement of contractor-furnished equipment and personnel to assure the contractor is prepared to do so. Likewise, the Army should

be equally prepared to replace Government-furnished equipment and restore logistical support or assume the contractor's role should the contractor's operation be destroyed beyond the point of feasible reconstitution. The latter possibility is higher for the contractor than the Army since it is unlikely he will have the degree of redundancy in skills and numbers of personnel and equipment that would be found in a Corps-size force.

2. National Boundaries

National boundaries, even between allies, can be major barriers to effective operations. Unlike the Status of Force Agreements which existed between the parties to the North Atlantic Treaty [38], the US will be faced with negotiating agreements with each of several nations in most other potential theaters. To complicate that task, most of the agreements will not be negotiated until hostilities are imminent or underway due to the political necessity for many Governments to downplay the US presence. [68] Another complicating factor is the religious, political and cultural differences that exist between neighboring states would probably result in a heterogeneous set of agreements in the theater. While the negotiation of the agreements would be the responsibility of the State Department or others, both the contract and the contractor will be affected by the terms.

Even under the premise that US armed forces will be invited into a nation to assist in its defense, the latitude for a contractor to operate may be so restricted that he is unable to perform as required. It is doubtful that a court would hold the contractor responsible for the Army's failure to provide any clearances, licenses, etc required by the contract and relied upon by the contractor in his planning.

Terms of interest to the contractor in an agreement would generally

be those that define his status or affect his operations or costs [38]. Examples are:

a. Are contractor personnel defined as members of the US armed forces, civilian component to the forces or invited contractors? Each status carries an increased risk of liability under the host nation's civil and criminal laws.

b. Will third country nationals (TCN) employed by the contractor require separate entry clearances or be exempted under the contractor's clearance assuming he is provided one? Are separate clearances required for each allied nation? Is the contractor or the individual responsible for registration under alien control requirements?

c. May the contractor use TCNs or be required to use host nation labor and businesses?

d. Which, if any, national taxes will the contractor and/or his employees be subject to, e.g. income, business, sales, social security and unemployment?

e. Can the contractor require any non-US subcontractors to adhere to US business laws or will the host nation's codes prevail?

f. Are there any mandatory nonworkdays or holidays?

g. Will the contractor's equipment and shipments be provided the same type of custom clearances as the US Army's?

h. Is the contractor's operation exempt from any nationalization actions by the host government?

i. Are the contractor's personnel allowed to bear arms to provide physical security or will the host nation provide this service?

j. If driving licenses are required, what types or which nations' will

be recognized?

These are only some of the factors which may influence the contractor's operations, costs or even his desire to participate in the solicitation. While some of these factors may appear to be mundane, lack of knowledge and the necessary preplanning to accommodate, overcome or change the most ordinary requirement can only lead to frustrated performance or possibly impossible performance and higher costs for all the contracting parties.

3. Occupied and Allied Nations

Other contractual issues are raised when either Country A and/or B (Figure 1) have been occupied by US armed forces. To this point the discussion has been within the context of factors to consider when operating within a host nation. Even though many of the host nation's issues are nonoperative in an occupied nation, some are magnified.

Providing security for the contractor's operation would become an increased problem for the Army and the contractor. This is especially true if the population of the occupied nation harbors any degree of resentment to the US occupation. The probability of sabotage and terrorist acts will multiply under those conditions.

An unfriendly populace would require the contractor to import most, if not all, of his labor force. Additionally, the contractor would have to provide his labor with some measure of protection or isolation from the native population. This becomes a very serious issue if the imported labor force is from allied nations unfriendly to the occupied nation, or are of racial, ethnic or religious groups incompatible with the indigenous population.

Under an agreement with a host nation, the degree of access to the

local economy for supplies and services should be considered in assessing the degree of logistical support the US Army would have to provide the contractor. In an occupied nation, the US Army should expect to provide total support to preclude any violation of the Geneva Conventions. This is true for any material, foodstuffs or facilities required by the civilian population for their well-being.

4. Support Functions

The types of support the contractor could perform in a theater are actually controlled by only one requirement - the contractor must remain a noncombatant. Beyond that, with sufficient compensation, a contractor would probably be willing and able to supply any type of support the Army might require. For that matter, there are very few support tasks that are uniquely military in nature. The applications may be military but skills such as maintenance, vehicle and equipment operation, vertical construction, warehousing and their management all have civilian/commercial counterparts. Today, contractors are vital links of many DOD weapon systems logistical systems. They maintain the systems in the field and provide repair parts support as well as provide operator and maintenance training. Contractor personnel can be found on Navy ships at sea and on station, in airfield maintenance hangers and managing government-owned, contractor-operated facilities around the world. Similarly, typical military support functions are performed by US contractors outside the continental US (OCONUS) for foreign nations.

Should the Army expose the contractor to unnecessary risk, i.e., other than the risk of commercial performance or those hostility risks already described which are present throughout the theater? To unnecessary risk

the answer is an unequivocal no; on the other hand, prudent risk is expected and acceptable. Defining the limits of prudent risk also serves to describe or limit the type functions performed by the place of performance in the theater and the effects on operations.

In a host nation, the contractor could expect to perform with minimal exposure to hostilities in the COMMZ (see figure 1). The exposure will increase as the function moves forward through the forward Corps support area into the division and brigade support areas. Under HNS, while the brigade rear boundary is considered the practical limit for the use of civilians, the use of military or paramilitary units is preferred forward of the Corps rear [30]. The mobile or static nature of the support is also used as a guide.

Using those guides, the contractor could logically provide line haul transportation from the ports of debarkation (POD) to Corps storage areas (which he could also operate). The only difficulty is that the Army would have to operate it's own fleet to handle the forward distribution of material to include the throughput distribution directly from the POD. Depending upon the transportation networks and assets, the distances involved and the degree of flexibility required, the Army would have to decide the combination of contractor and government operation that would be most effective. A similar assessment of risk would be required for each support function in respect to its expected place of performance as well as how the function would be performed.

There are two other risk factors in the decision to assign a function to the contractor. The requirements for the contractor to provide equipment/facilities and labor both entail risk depending on the quantities and

types required. While these are more in the nature of commercial possibility, the Army bears the risk and its consequences if the contractor is put into a position of impossible performance.

A contract that requires the contractor to be able to equip and start operations in a host nation within a set time period must be realistic in its requirement. In most underdeveloped countries, many types of equipments (i.e., material handling, container handling, machine tools, power generation, etc) are either in short supply or inadequate for the scope of work envisioned. The contractor would be required to lease or purchase the equipment elsewhere for use in the theater. Since the time allowed to activate the operation would be shorter than the leadtimes to manufacture and/or order and ship the equipment, the contractor would have to preposition the equipment. Unless the equipment has some other commercial application, the Government would be expected to pick up the prepositioning costs.

Prepositioning in-country presupposes that the contractor has legitimate access to the potential host nation for that purpose. In the case of a covert operation, the contractor and the US run the risk of being exposed. This would entail a loss of business for the contractor with the nation and its sympathizers and a loss of credibility for the US. Use of an accessible nation as a prepositioning site for contractor equipment pending the negotiation of an access agreement with the desired host nation is a more viable optior even though the shipping time penalty is incurred.

The other major resource, labor, could be an equally difficult requirement to fill. This is a problem the contractor will be sharing with several other requiring activities to include the US Army. As shown

on Table 1, there would be at least six activities contending for labor from the same three sources exclusive of the requirements of the host nations' economies. The problem is compounded when the dimensions of skilled or unskilled, quantities required, and distance to the labor markets are added to the matrix along with the potential personnel problems discussed under national boundaries.

TABLE 1: LABOR REQUIREMENTS - SOURCES

SOURCE / REQUIRING ACTIVITY	US	TCN	INDIGENOUS
US Army Direct Hires	X	X	X
US Army Contractors	X	X	X
Other US Forces	X	X	X
HN Support		X	X
HN Armed Forces		X	X
Allied Armed Forces	X	X	X

Just as true for personnel as for equipment and facilities, the contractor's responsiveness will be dictated by market conditions at the time of contract activation. Since this is some unknown point in the future for most of the contemplated contingency contracts, unless the contractor can utilize the quantities and types of labor in his current operations,

it is unrealistic to expect fully guaranteed performance. An example of things beyond the contractor's control that would influence his labor procurement is his dependence on commercial transportation to bring both Americans and TCNs into the host nation. Unless the contractor controls the transportation mode and the POD, he can only plan on their availability. If the lines of communication, air and sea, are tied up with military traffic, the contractor would have no other transportation options.

D. TIMING THE CONTINGENCY CONTRACT

The planning in a contingency contract to mitigate and assign risks is also a function of when contract performance is expected, as suggested in the earlier discussion on acquiring labor, equipment and facilities. The LOGCAP operational plan [35] only provides for two options, modifying current contracts or executing new ones to acquire support when and if required upon mobilization. These two alternatives are shown on the contingency contracting time scale (Figure 2) as courses of action D and E. Those courses are the most realistic approaches for premobilization.

The consequences of waiting until some later date to award the contract for known requirements are shown by the first three courses in the figure. The point in time at which the contractor would be able to commence operations is dependent on the leadtimes required by the Government to acquire the service and the contractor to put the resources into the required place of performance. These leadtimes are as real for contingency contracts as they are for a supply contract. If no effort is made to plan and award the acquisition prior to the required date as shown by course A, the cumulative leadtimes will push the date of performance to some time after the required date. While courses of action B and C move the contract

COURSE OF ACTION

A. Contract awarded after C date; no prior acquisition planning

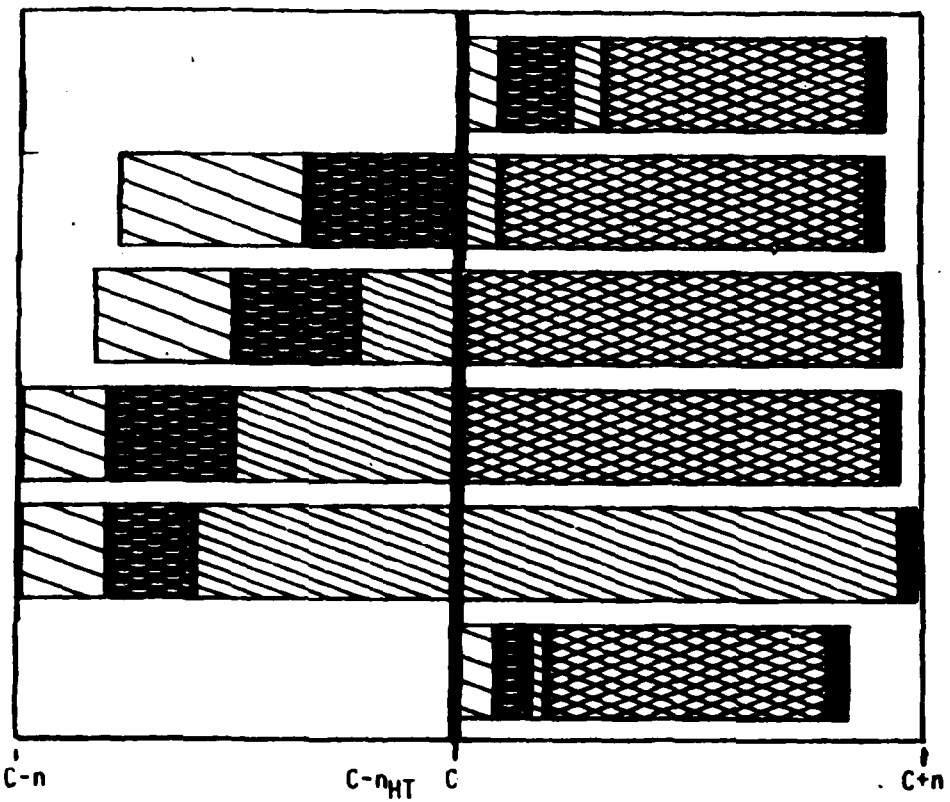
B. Contract awarded at C date

C. Contract awarded at C-n_{HT}

D. Contract awarded on basis of planned requirements to allow contractor to adequately plan & prepare for immediate performance when required

E. Contract for services which are ongoing and will be continued in theater of operations

F. Contract for requirement generated by Combat Operations



LEGEND

ACQUISITION PLANNING

SOLICITATION & AWARD OF CONTRACT

LIMITED CONTRACT PERFORMANCE (CONTRACT MOBILIZATION PERIOD)

CONTRACT PERFORMANCE

TERMINATION OF REQUIREMENT FOR CONTRACT OR CONTRACT PERFORMANCE COMPLETED

C - Commencement date for Contingency Operations
C-n - Time prior to C-Date
C-n_{HT} - Warning period due to Heightening Tension
C+n - Post C-Date period

Figure 2: Contingency Contracting Time Scale

award forward, the contractor's ability to respond is still limited by the leadtimes.

To better understand what the contractor is doing during his mobilization period, the task of staffing the contractor's operation is shown by Figure 3. Depending upon the level of effort permitted by the contract and the host nation, the contractor's starting position for manning could be anywhere between a set of plans and an ongoing operation. In the worst case, the contractor would not be permitted into country prior to hostilities, or at best, due to a period of heightening tension. Prior to that time, he should have recruited for the management team and any special requirements for professionals or skilled labor. However, unless the Government is willing to fund an assembled workforce or cadre for an indeterminable time, the contractor will not call up the selectees until they are required. Just as in a military draft, some portion of the numbers called will prove to be unavailable for service and replacements will be required. Once the contractor has assembled a workforce, he has to process the personnel for physicals, immunizations, visas, identification cards, uniforms, etc., appropriate to the specific worksite. Subsequently, the contractor still has to move the workforce to the worksite by either commercial or government-furnished transportation.

In a US economy going through the throes of a mobilization, the contractor will have to contend with many obstacles to include those caused by military priority use of transportation, medical facilities, etc. Even in peacetime, the task of getting personnel to remote stations is time consuming. As an example, the average time for one US contractor working with a foreign country to notify, process and transport an employee to

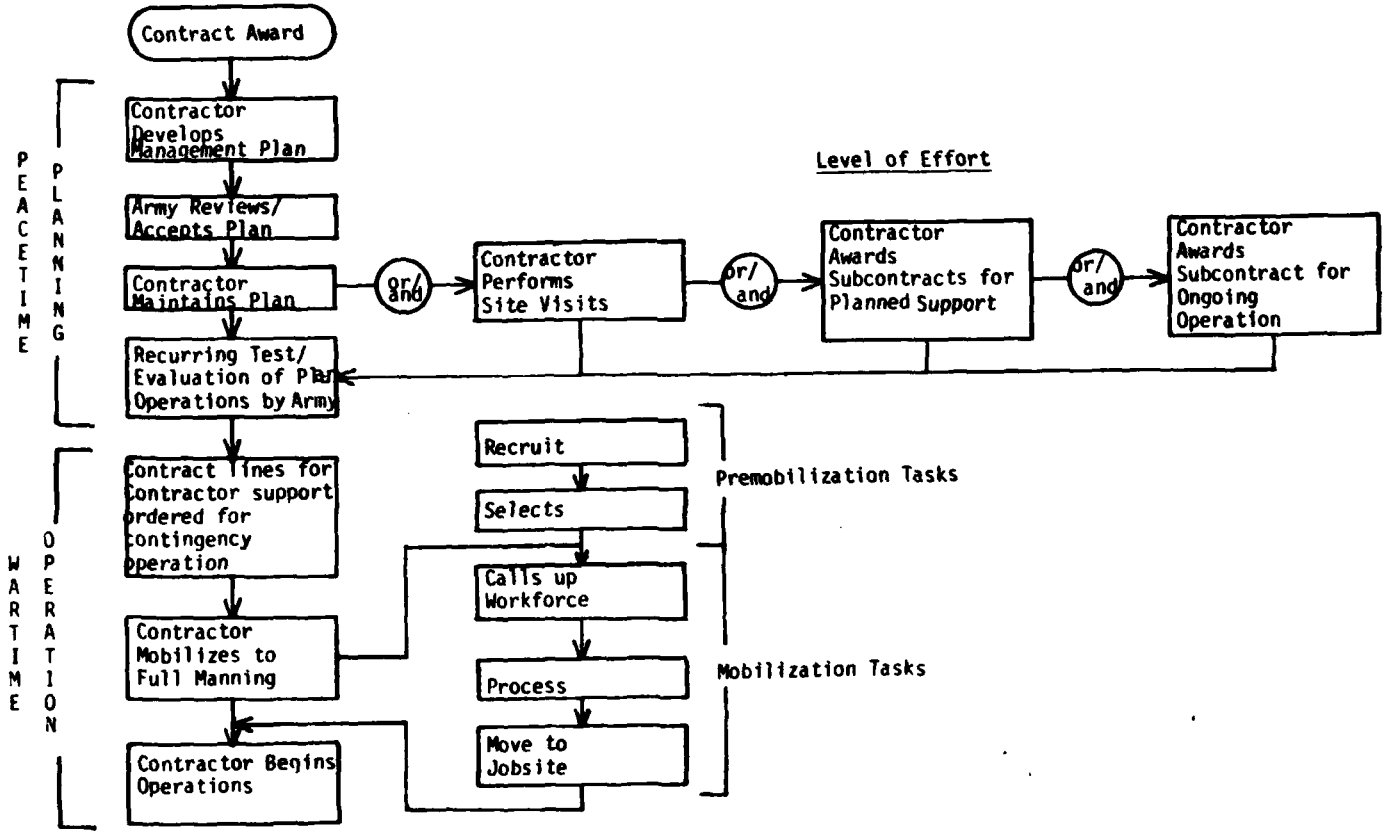


Figure 3: Contractor Mobilization

that country is 17 days. That time is based on selecting the employee from an existing list of selected applicants, minimal processing time for any visa or similar requirements, using scheduled airlines and usually involves only two to five employees per month. Multiply the number of employees many times and include the complications of acquiring the labor outside the US, insufficient or nonexistent transportation, and only minimal planning or agreements with other nations for visas, clearances, etc. and the scope of the contractor's task becomes overwhelming. This is especially true when the Army expects performance within a given number of days after notification while allowing the contractor only minimal access or preparation.

Given the cost, time and political constraints, the only solution to the leadtime problem, short of abandoning LOGCAP, is for the Army planners to be realistic in the planning factors used to develop the statement of work (SOW) and contract terms. The contractor's tasks will be very similar to the military's in terms of planning, mobilizing and actual operations. If the contractor must be as prepared as the military units he will support, he will have to be funded accordingly. If the Army requires the contracts to be in operation by a given time, the Army must be be ready to support the contractor with any military resources and prioritization not commercially available that a military unit would require to reach operational status. The less realism used in planning and contracting, the higher the probability of the contractor being unable to perform.

The last course of action from Figure 2, F, is also one with a high probability of occurrence. In addition to any contract modifications that may be required to keep the LOGCAP contract current with the changing

requirements of an ongoing operation, there will be new requirements generated outside the scope of the preplanned LOGCAP operations. These would not be contingency contracts per se, but are opportunities for providing increased or better support to the Army without using military personnel which is a LOGCAP objective.

In addition to having trained contracting personnel in theater to convert the new requirements to contracts (see Chapter V), the Army must have planners and operators, both combat and logistical, that can recognize the contracting opportunities. During World War II, the use of in-country contractors and facilities that became available as the Allies moved East in Europe proved to be of some limited value. If the opportunities had been anticipated and the military requirements better coordinated, a greater degree of utilization could have been recognized. [39] The Army should be prepared the next time to reap those potential benefits.

E. SUMMARY.

LOGCAP will require a contractor to operate in a hostile and most likely inhospitable environment. To increase the assurance that he can perform, the Army must be realistic in its planning for contractor support. Likewise, the contractor must be prepared to tell the Army what support the contractor can provide or will require, the time required for response, and the projected preparation costs as well as operation costs. Considering the consequences to the contractor and the military if the contracted support proves to be inadequate or nonavailable, nothing less than full cooperation should be accepted.

CHAPTER III

EXTERNAL FACTORS IMPACTING CONTINGENCY CONTRACTS

A. INTRODUCTION.

In addition to the acquisition laws and regulations that govern the actual contract, there are two other major influences that affect contingency contract operations. These factors, being external to the DOD and Army, must be considered in the Army's planning for both military and contractor operations. Unlike Defense or Army policies or regulations which can be modified by the respective authorities to meet changing military requirements, the factors discussed in this chapter are conventions, laws or policies promulgated by external forums or agencies. As such, the factors must be accounted for in the Army's concept of contract operation as well as in the contract planning and execution.

B. GENEVA CONVENTIONS.

The Geneva Conventions, to which the US is a signatory, are a set of international agreements that are literally the rules of international law applicable in armed conflict. [37] While the 1949 and earlier Conventions referred to the rules of war, the 1977 Protocols to the Geneva Conventions broadened the coverage to armed conflicts. This was done in recognition of the numerous conflicts short of declared war that had occurred since WWII and to assure the Convention principles would apply. While the Conventions' articles cover many topics, the ones of interest to contingency contracts are those relating to the contractor's status, and the use of local resources in an occupied nation.

1. Contractor's Status

The contractor personnel's status as noncombatants and their

corresponding entitlements under that status are defined by Articles 43 and 50 of the Protocol and Article 4A of the Third Convention.

a. Article 43 - Armed Forces: The contractor personnel do not conform to the definition of a combatant as defined by the article, i.e., organized armed forces.

b. Article 50 - Definition of Civilians and Civilian Population: The contractor personnel do meet the general definition of a civilian. A civilian is any person who does not meet the definition in Article 43 or specific sections of Article 4A.

c. Article 4A - Prisoners of War: Contractor personnel if captured by the enemy shall per Article 4A(4) be accorded treatment as a prisoner of war, provided they have received such authorization in the form of an identity card from the armed forces they accompany.

The only cautionary note is that, as mentioned in the previous chapter, the Army and the contractor must studiously avoid any conduct or appearance of acting as mercenaries. The simplest way not to conflict with any of the definitions found in Article 47 - Mercenaries, is to prohibit the issue or use of firearms by contractor personnel. The contract should provide for removal of contractor personnel for violation of this requirement.

2. Availability and Use of Local Resources

If local resources are used, either by purchase or requisitioning (i.e., the taking of possession by agents of a sovereign occupying power) the effect on the civilian population must be considered. While the Conventions are referring to actions in an occupied nation, the same principles would hold true in an underdeveloped host nation. Some of the

significant articles which may preclude the use of such resources by the Army or its contractors are:

a. Article 14 requires the occupying power to ensure the medical needs of the civilian population are satisfied before medical services can be requisitioned by the occupying power. Given the normally inadequate medical services in most third-world countries, the Army will probably have to share its own limited medical resources with the civilian population. Any medical requisitioning would probably be in violation of this article unless done in a developed country.

b. Article 54 prohibits denying the civilian population adequate foodstuffs and drinking water. The occupying power must therefore limit its requisitioning of foodstuffs and drinking water in direct relation to the needs of the civilian population. Since most third world countries are food importers and some are virtual deserts, requisitioning of food and water would only complicate the problem.

c. Article 63 prohibits the requisition of buildings or material used by civil defense organizations if such requisitioning would be harmful to the civilian population. The requisitioning of buildings would probably pose a problem in third world countries where available shelter would be limited.

d. Article 69 requires the occupying power to ensure the provision of clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population of the occupied territory. This article could make the occupation of any country with a sizable civilian population and a weak economy a potential burden to the occupying power.

The effect of these and other articles to the Geneva conventions is to both prevent abuses by occupying powers and to clarify the rights of civilians. It also complicates the ability of the occupying power to use requisitions to "live off the land" since the needs of the civilian population are to be met first. Only those materials or services determined to be in excess of civilian needs can be legitimately requisitioned.

The Army's Civil Affair doctrine [40] requires the civil affairs (CA) personnel assist and advise purchasing and contracting, real estate and personnel officers in determining availability of sources, making arrangements for procurement, and weighing immediate needs against longer range requirements. It also stipulates that "Except in emergency situations local procurement will be avoided when subsequent importation of similar items for civilian consumption will be necessary." CA doctrine required that US Army Logistics (G4)and Civil-Military (G5) staff functions cooperate to strike a balance between the needs of the military and the needs of the civilians. Since no formula exists for use in making this determination, each situation will have to be individually analyzed and judgment applied, not only for supplies but for construction and transportation services as well. The noble intentions of an occupying power would mean little to a civilian population suffering from basic shortages, in part brought on by the same occupying power.

C. INTERNATIONAL AGREEMENTS.

The Secretary of Army has been delegated and has redelegated to the heads of the Army Staff agencies and major Army commands (MACOMs) the authority to negotiate or conclude certain categories of international agreements. [11] Unfortunately, the authority delegated to the Army (e.g.,

agreements for a minor and emergency force deployments or agreements for cooperative logistics support) is too limited for the broad scope of contingency contracting requirements. As discussed in Chapter II, the terms of international agreements will affect the contractor's operation. Without substantial knowledge of what requirements or prohibitions may be imposed by an agreement, the contractor may be placed in the untenable position of impossible performance before performance even occurs. (Impossibility of performance is defined in Chapter IV.)

Considering the unlikelihood of concluding an agreement with any of the US's potential third world allies prior to commencement of hostilities, the Army must convey its minimum requirements for agreement provisions to the State Department or any other agencies responsible for negotiating the agreement [19] at the earliest practical point. The Army must be unequivocal in the defense of its requirements if the Army's contingency operation cannot be conducted without contractor support. Those minimum provisions, on a country by country basis, can then be used by the Army planners and the Contracting Officer to establish a baseline for contractor performance.

D. SUMMARY.

While some may consider the Geneva Conventions or the terms of an international agreement to be unnecessary considerations in military planning, both have the effect of law regarding the conduct of US Armed Forces and their contractor in either a host or occupied nation. Even when an agreement does not exist, the acquisition planner must anticipate what conditions the contractor will operate under and the effects on contract performance, or equally, the potential effects of the conflict on the contractor and his personnel.

CHAPTER IV

CONTINGENCY CONTRACT FORMATION AND MANAGEMENT

A. INTRODUCTION.

A contract is more than an assemblage of clauses. It represents a requirement to provide a supply or service (sometimes both) under an accepted set of terms and conditions. To reach the contract stage in the acquisition cycle is the result of planning and managing the tasks of describing the requirement, developing an appropriate form of solicitation, and conducting a fair evaluation of the contractors' responses. The result, with the application of judicious contract administration to assure that both the Government and the contractor faithfully execute the contract, is the provision of the required supply or service at the agreed price. A successful outcome is as equally dependent on Government actions as it is on the contractor's. A hasty or incomplete solicitation effort, the use of inappropriate contract types or clauses, or assuming an ill-defined requirement is understood may not preclude contract award. However, they are likely guarantees that performance will not be as desired or at the expected price and will be subject to the effects of an acrimonious relationship between the parties.

Contingency contracting, by its very name, will have many areas in the requirement alone that will be difficult to articulate, contract for and administer. This is especially so, if the Army personnel involved in contract formation or administration are not adept at Government contracting. The following discussion will provide readers without prior contracting experience an understanding of the acquisition process and the Government contract. While some of the discussion may be basic, specific points

of interest for contingency contracting are covered. For those with more acquisition experience, the schematics provide tools for explaining and accomplishing the planning and statement of work (SOW) development functions with less experienced personnel.

B. PRINCIPLES OF GOVERNMENT PROCUREMENT.

1. Elements of a Contract

By definition, any contract must be an agreement enforceable by law; contingency contracts are no exception. Agreements not enforceable by law are obviously not contracts and therefore not desirable, especially in view of the criticality of performance under a contingency contract to the supported combat mission. All significant solicitations should first be subjected to a legal sufficiency review by a lawyer(s) versed in procurement law. While this may still not ensure success if later subjected to court review as part of a dispute, the more obvious legal deficiencies will have been eliminated.

To obtain an agreement enforceable by law, five elements must be present. These elements are: (1) offer, (2) acceptance, (3) consideration, (4) legal and possible objective and (5) competent parties. Should any one of these be missing, the Army will have no contract and the contractor will likely be absolved from both performance and liability. The fact that this can happen in a peacetime environment only makes its occurrence in a rapidly changing mobilization situation all the more likely.

a. The first element, an offer, is nothing more than a promise by one party to another party. Traditionally in government contracting, the contractor is required to initiate the offer. Such an offer to be legally acceptable must meet four conditions: (1) intent, (2) completeness, (3)

communication and (4) clarity and unambiguousness. Intent means the offer is not a jest but intended to be a serious offer. Completeness means that all essential elements are present: price, quantity, quality, and delivery requirements. Communication means that the offeror's offer must be received by the offeree. Clarity and unambiguousness means just that: both parties should have reasonable interpretations that are in mutual agreement. If not, the court's decision will likely go against the Government under the legal principle of the Rule of Ambiguities since the Government wrote the contract.

Ambiguities are routine hazards in peace time contracting for well known requirements. In contingency contracting which will likely require the development of a contract for planned performance from operation plan requirements, the chances of an ambiguity occurring are substantially increased. The cost to the Government to clarify the ambiguity will likely exceed the original cost expectations.

Several steps can be taken to reduce the inadvertent inclusion of ambiguities: (1) make the statement of work be as specific as possible, (2) have a provision placed in the solicitation that the figures are merely estimates for planning and evaluation purposes, (3) require a legal review before the solicitation is released and (4) use a draft SOW and/or conduct a pre-proposal conference to determine if any clarification is necessary. Once the contract is written, arrangements should be made to keep it current by modifying it to include the latest planning requirements. This last step should prevent the growth of ambiguities due to the passage of time.

b. The second element, acceptance, occurs when the Government accepts an offer from an offeror. This is the award process. The acceptance must be timely and not delete or change the terms of the offer.

c. Both parties to the contract must receive some form of consideration. Consideration is often called "mutuality of obligation," which implies that both parties to a contract are obligated to act in a certain way. It is the price bargained for and paid for a promise. In short, consideration must pass from each party of the agreement to the other. The Government's consideration is usually its promise to pay the contractor a specific dollar amount, while the contractor promises to deliver or perform as agreed. Consideration need not be adequate or even reasonable in terms of economic values exchanged, but it must be legally sufficient. All that is required for legal sufficiency is that something of value or a benefit be provided.

The courts do not have a duty to spare one party or the other from the economic hardships of a contract otherwise legally made. Therefore, in terms of the legality of consideration, this principle is just as valid for a contingency contract employed on the otherside of the globe as it would be for a peacetime CONUS supply contract. However, the contingent contract poses a higher risk to the Army should the contractor fail to perform for any reason . Inadequate consideration from the Government must not be allowed to contribute to the failure of what could rapidly become the most critical contract in the Army. The comfort of being legally "right" in a court opinion at some later date would be small consolation to those who suffered because of the contractor's inability to perform. The objective therefore should be the negotiation of reasonable

consideration, rather than the attempt to obtain a price which is more legally sufficient than adequate for the promises received.

d. The fourth requirement, a legal and possible objective, is that (1) the contract must not be to commit a crime, which would make it illegal, and (2) the objective must not be impossible or commercially impracticable. Performance is always a possibility but never a certainty. The best contractors will from time to time encounter "unexpected" conditions which may adversely affect their performance. When this occurs, the reason given might well be (1) impossibility, (2) commercial impracticability or (3) in the case of overseas performance, a conflict with host nation laws or practices regarding commerce or labor. The degree to which each of these can excuse a contractor needs to be examined.

In terms of contingency contracting, the most likely form of impossibility would be the result of physical destruction or nonavailability of personnel, materials, or services essential to the performance of the contract. Should this occur, impossibility as a legal defense requires the contractor to carry the burden of proof in establishing that not only he but no other contractor could have performed the contract. Should anyone else be able to perform, impossibility would not exist.

Another danger is that the Army's contractual requirements may prove to be so overly broad as to provide the contractor a "built in" impossibility excuse since no one could have performed. Should this occur, the Government might still prevail if it could show that the contractor was aware of his obligations at contract inception and had therefore assumed the risk. This is best accomplished by having the offeror confirm his offer, but only if he is alerted to the area in question. The contractor

would have to prove the task was impossible and not merely too difficult. Even if the contractor's excuse is valid, the contractor is still expected to give timely notice to the government and to make every effort to mitigate damages.

Unlike impossibility, commercial impracticability does not require the presence of some form of physical impossibility. The burden of proof, however, still remains on the contractor. Commercial impracticability requires that (1) the contractor did not assume the risk and (2) contract performance was clearly beyond the scope of the bargain and not within the contemplation of the parties at the time of entering into the contract. While the mere loss of profit or economic hardship brought on by rising prices will not create a commercial impracticability, under the first provision, it may result in reduced contract performance. The latter part of the definition underlines the care which must be taken in writing the SOW. If the scope of the bargain is too broad, risk becomes too great and contractor interest in competing diminishes. If it is written too narrowly, the contractor remains unobligated to perform work that he would otherwise be expected to perform. Narrowly written SOW's can always be modified once events establish the actual requirement, but the delay in identifying those requirements adds to the contract administration burden, diminishes the likelihood of timely response and creates the appearance of cost overruns. Obviously care taken in defining the "scope of the bargain" will do more good for the Army than just avoiding commercial impracticability excuses.

Conflicts between our contract terms and the laws or practices of a host nation are a more than passing possibility. While the Government is

in a strong position to demand that the contractor perform as required, the comfort that can be derived from the upholding our laws in our courts, should not make one think there is no problem. While the US dollar is generally accepted world-wide, the imposition of US laws and business practices come closer to being shunned. Contractors do not want to be in the untenable legal position of having to compromise either US law or some foreign law. Accordingly, their proposals may include conditions for US provided foreign waivers or clearances prior to performance, i.e., conditions that only the State Department can lawfully negotiate. As complex as this may make obtaining a contractual agreement, the alternative could be no contingency contract or, worse yet, no or impaired performance.

e. The final factor, competent parties, merely requires that neither party be underaged, intoxicated or institutionalized. None of these requirements are generally a problem in Government contracting.

2. Type of Contract

a. Selection of Contract Type

The selection of a specific contract type has always been a matter of judgement entrusted to the contracting officer. The skill and care with which he accomplishes this presolicitation task can have far reaching post-award consequences. Failure to select the right contract type can cause one party or the other to incur unjustifiably high risk in relation to the consideration received. Therefore risk, more than anything except statutory or regulatory restrictions, influences contract type selection. DOD policy has always been to accept a reasonable share of the risk. Although not explicitly stated in the Federal Acquisition Regulation (FAR), the Government, in negotiations, must consider the inclusion of any

contractor provisions which may alter the Army's share of the risk. In fact, it is the very presence or absence of certain contract provisions which gives a contract its distinctive characteristics and determines its "type."

There is an inverse relationship between the amount of risk the contractor assumes due to the contract type selected and the appropriateness of a type of contract based on the risk involved. As shown in figure 4a., the contractor share of risk with a firm fixed-price contract is 100 percent. In return for his performance, the Government is willing to pay the contract price with the understanding that the contractor's amount of profit, or lack thereof, is primarily a function of his management of his firm's performance. However, as the degree of uncertainty in the contract performance requirements increases, the appropriate types of contract the Government should consider moves from the fixed-price types into the cost-reimbursement family (See figure 4b). Cost-reimbursement types of contracts pay the contractor for allowable incurred costs up to a ceiling prescribed in the contract. It is important to remember that selection of the contract type is a Government function which is negotiated with the offeror. Forcing the contractor to accept an inappropriate type of contract will serve no more good than allowing him to assume more risk than is reasonably acceptable. The selection of an appropriate type of contract is one means of influencing the contingency contracting outcome.

Contracts are categorized by purpose (i.e., supply, service, construction, automated data processing equipment, etc.) or by pricing arrangement (i.e., fixed-price or cost-reimbursement). The first category,

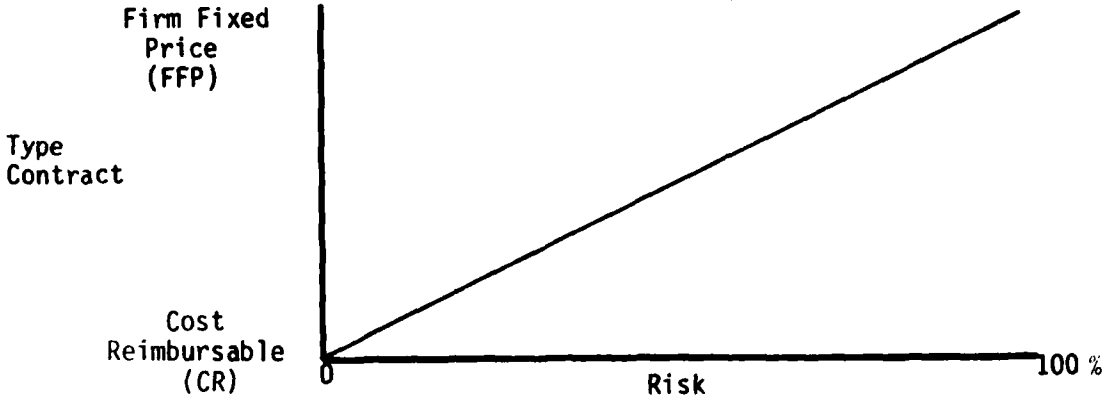


Figure 4a: Contractor's Assumption of Risk

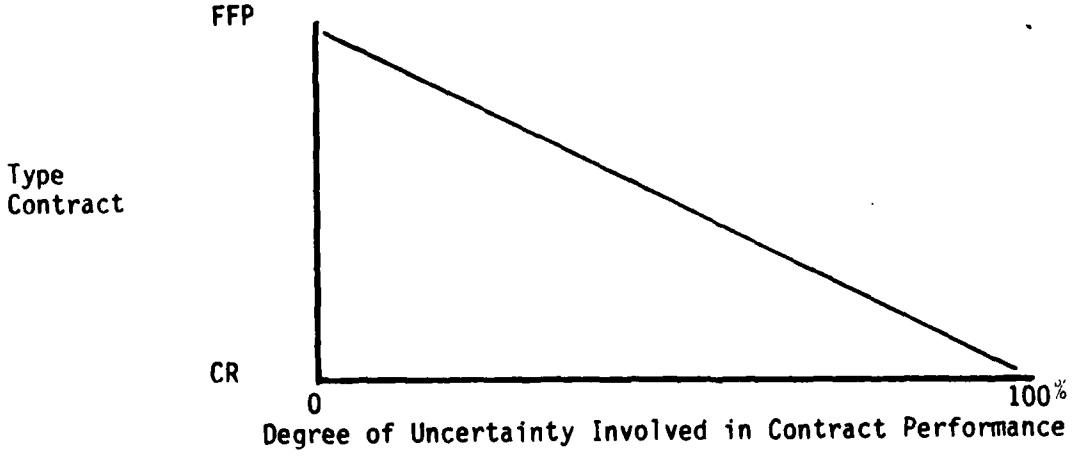


Figure 4b: Appropriate Type of Contract Based on Risk

purpose, requires little explanation since the requiring activity's specification or statement of work makes the determination rather automatic. This in turn determines some of the provisions to be incorporated and procedures to be followed. But it is the selection of a pricing arrangement and attendant clauses that requires the greatest judgement, because the needs of the customer are usually not negotiable. Therefore, the pricing arrangement must be adjusted to fit the risk that accompanies the customers needs. In the case of contingency contracting the needs of the customer are likely to be imprecise in three critical areas: quantity, quality, and delivery. It therefore follows that the offers (if any) that are received could be equally imprecise as to price or contain so many contingency costs or disclaimers as to be nearly valueless.

While there is no official definition of contingency costs in the FAR, such costs have long been held to be undesirable and inflationary. They are costs associated with fixed price contracts and usually appear in a proposal as a higher than normal profit or as additions to the market price for labor or materials. The solution, when confronted with a proposal containing contingency costs, is to identify the origin of the contractor's concern. If the contractor can identify his specific concern, then a clause might be devised (e.g. economic price adjustment) to remove his concern for assumed risk and obtain a contract price which is more representative of the required performances. In the case of contingency contracting, the very inability of the Government to be specific will almost guarantee that any attempt by the Government to obtain the "coveted" fixed price contract will be confronted with prices which contain contingency costs. There is no statutory or regulatory restriction which prohibits

such contractor behavior in negotiating fixed price contracts. Accordingly, it will have to be either tolerated as long as the total price can still be considered "fair and reasonable" or the contractual arrangements altered to placate the contractor's fears.

b. Characteristics of Fixed-Price Contracts.

The most preferred types of contracts are the members of the fixed price family of contracts. Fixed price contracts have the following characteristics:

(1) They require an acceptable product or performance before the contractor is entitled to compensation.

(2) The Government normally doesn't care how much money the contractor spends to perform the contract as long as he performs, since the price is fixed.

(3) Unless the Government authorizes the modification of the contract, the contractor cannot increase the Government's costs.

(4) Fixed price contracts are potentially the easiest contracts to administer because the contractor assumes so much of the risk that denial of his claims is relatively easy to justify.

In terms of contingency contracting, however, the fixed price type of contract has several drawbacks which make its suitability questionable. For example:

(1) Should the contractor encounter financial hardship in performing the contract, the contracting officer cannot trade away the contractual rights of the government except for new or more valuable consideration. Therefore, the contractor's original negotiation position would require the inclusion of contingency costs which the Government would pay whether

or not the contingency occurs.

(2) Everytime the Army wants to modify the contract, a new contract price will have to be negotiated. Given the potential uncertainties of SOW's and the equal potential for a surge of authorized and unauthorized contract modifications being issued following contract activation, contract administration personnel would become overburdened almost immediately. To be effective, contract administrators need to spend their time doing more than negotiating contract settlements.

(3) Economic price adjustment (EPA) provisions could be included in a fixed-price contract to prevent a contractor from otherwise arbitrarily increasing his negotiating position to protect himself from unknowns. The need for such protection is based on the likelihood that shortly after deployment the demands of the Army and its contractors will produce a highly inflationary local economy. However, the use of EPA assumes an acceptable wage/price index can be found and agreed to, a most unlikely possibility in any third world country with a mixed indigenous and TCN labor force.

None of this discussion totally rules out fixed-price contingency contracts, but rather illustrates the limitations of using a contract type designed for static situations with routinely predictable requirements. Contingency contracting will never enjoy such conditions, unless after several months of deployment in one region, the situation becomes static enough to justify conversion to fixed-price contracts. A provision could be included in a cost reimbursement contingency contract that would allow for conversion to a fixed-price contract at the option of the contracting officer should he deem regional economic conditions to be

justifiably stable. While there is no precedent for such a hybrid contract, the concept of a contingency contract on a global scale is equally without precedent.

c. Characteristics of Cost-Reimbursement Contracts

If a fixed price contract is not sufficiently flexible for contingency contracting, cost-reimbursement contracts may be appropriate. While not the preferred type of contract, they are often the best contractual solution for satisfying needs that are not sufficiently known or defined. But there are disadvantages:

(1) The Government would be required to accept a higher risk of non-performance than with fixed-price contracts. The contractor is only required to give his best effort to be entitled to compensation. That best effort could be less than planned.

(2) The courts have traditionally held that should a cost-reimbursment contract be terminated, the contractor is expected to come out financially "whole." Penalty provisions have no place in cost-reimbursement contracts.

(3) The Government will have to approve the contractor's accounting system and all invoices will have to be examined to insure only allocable, allowable and reasonable costs are reimbursed. The number of specialists required to monitor a cost-reimbursement prime contract far exceed the needs of monitoring fixed-price contracts, which by comparison are almost self-regulating.

(4) The contractor has minimal responsibility for performance costs and therefore little incentive to control the costs. Unless an incentive for cost control is included in the contract, the contractor's

fee (profit) is relatively independent of the total costs incurred.

While the above disadvantages may be disconcerting, the following advantages offer significant compensation for using a cost-reimbursement contract.

(1) The prices one can expect to pay would be market prices wherever that market might be. This should eliminate the threat of non-performance or reduced performance because of inadequate consideration.

(2) Should the needs of the Government expand beyond the original contract requirements, a contract modification can be issued immediately. With the cost accounting procedures already in place, capturing the increased costs would be relatively simple compared to the effort of negotiating a fixed-price contract.

(3) This type of contract would eliminate paying fixed prices which have been inflated by the addition of contingency factors.

While each of the aforementioned observations on fixed-price and cost-reimbursement contracts could be developed further, the information provided establishes the areas of consideration in contract choice. The choice belongs to the contracting officer, but that choice will be greatly influenced by the ability or inability of the Army to be specific and accurate in describing its contingency needs.

C. ACQUISITION CYCLE.

All contracting efforts follow essentially the same steps regardless of whether the requirement is well known or not, as in the case of contingency contracting. Figure 5, depicting the Acquisition Cycle, illustrates this point. The first step is always to define the requirement. In many respects this step will be the most difficult part. Any omissions here will have far-reaching consequences for the remaining steps, particularly

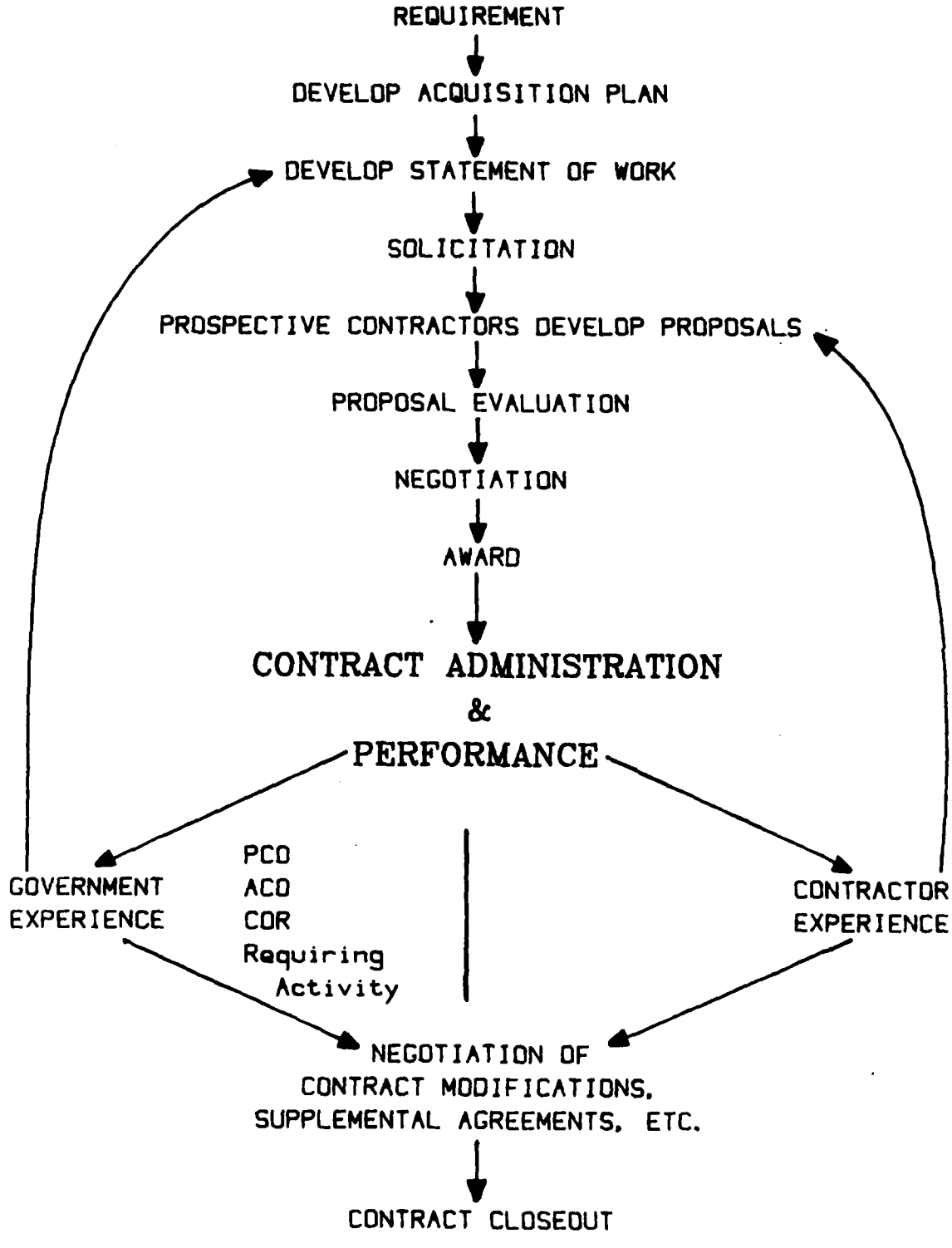


Figure 5: Acquisition Cycle

those related to performance. Therefore, the care with which the requirement is developed is essential to success.

The next step is the development of the acquisition plan, the outline of which is featured in Table 2, Acquisition Planning for Contingency Contracts. This function is normally undertaken by the contracting officer, who, depending on the requirement, may or may not have to include all the elements listed in the table. Given the complexity, if not the actual dollar value of contingency contracting, a formal plan in some detail should probably be required.

What follows next is the development of a statement of work and matching quality assurance (QA) plan. This is a team effort undertaken by the contracting officer, the requiring activity and any specialists that may be required. Some of the details as to how this is done will be discussed in the following section on preparation of the SOW and QA plan. Since this is the key technical document upon which the contractor must base his offer, deficiencies will be reflected in the proposals and potentially in contract performance, if they are not corrected.

At the same time the acquisition plan is being written, the need for a formal source selection should also be determined (see Table 3). Formal proposal evaluation and source selection procedures are routine in the case of weapon systems but not normally required in the case of service-oriented contracts. However, the uniqueness of contingency contracting may require a source selection authority other than the contracting officer, who normally performs this task.

A source selection evaluation plan (SSEP) must be written prior to release of the solicitation. Compatibility of the plan and the solicitation evaluation provisions must be assured. The SSEP will be the basis

TABLE 2: ACQUISITION PLANNING FOR CONTINGENCY CONTRACTS

- Begins as soon as need is identified
- Requires a designated person or office as the planner
- May be written or not dependent upon agency and command
- Outline for an Acquisition Plan

I. Acquisition Background and Objectives

A. Statement of need
B. Any applicable conditions - requirements or constraints
C. Cost goals and rationale
D. Required capabilities
E. Performance period requirements
F. Risks - cost and schedule

II. Plan of Action

A. Prospective Sources
B. Competition
C. Source Selection Procedures
D. Contracting Consideration
E. Authority to Negotiate
F. Budget Estimates and availability of funds
G. Management information requirements
H. Government - furnished property
I. Government - furnished information
J. Security Considerations
K. Acquisition cycle milestones
L. Participants

Reference: FAR 7.105 tailored for Contingency Contract Requirements

TABLE 3: STEPS IN A FORMAL SOURCE SELECTION

1. Determination that Source Selection Procedures Apply

2. Appointment of Source Selection Officials

3. Development of Source Selection Evaluation Plan

   Source Selection Organization
   Presolicitation Activities
   Acquisition Strategy
   Evaluation Factors and Their Relative Order
   Evaluation Process
   Milestones

4. Source Selection Authority Approval of Plan

5. Solicitation Issued

6. Receipt of Proposals

7. Proposal Evaluation

   Cost or Price Evaluation
   Technical Evaluation

8. Determination of Competitive Range

9. Conduct of Negotiations

10. Receipt and Evaluation of Best and Final Offers

11. Source Selection Decision

Reference: FAR 15.6

for conducting a fair and rational evaluation, and it must be in accordance with the solicitation evaluation provisions.

The solicitation is developed by the contract specialist who will be required, in all likelihood, to write and staff an indeterminate number of special contract clauses related to State Department clearances, passports, immunizations, post exchange benefits, I.D.'s, dependents, etc. The resulting solicitation will no doubt be classified and its release accordingly restricted. A legal sufficiency review is also required prior to the solicitation release.

Prospective contractors will require time to develop their proposals. There is no way to hurry this phase without risking either a loss of competition or the submission of defective proposals. In fact, it may be necessary to hold a pre-proposal conference to answer questions prospective offerors may have regarding the requirements.

Once the proposals are received, their evaluation will be undertaken by the contracting officer (or the source selection board if used). Should the proposals require clarification or discussions prior to an award determination, the contracting officer will determine the extent of communication with the offerors. Ultimately an award will be made as determined by the contracting officer (or Source Selection Authority) to be in the best interests of the Government. The award process marks the completion of the preaward phase and the start of the post-award phase.

Contract performance is the objective of the contract award process, but the award does not means the Government's job is done. Contract administration by the Government is equally important to achieving required performance as the contractor's management. Therefore both are highlighted

in Figure 5. Since contracts do not enforce themselves, it will take motivated and trained people to monitor and enforce contracts.

The extent to which the contracting officer (CO), who awarded the contract, elects to delegate or withhold contract administration functions is determined by the guidelines of FAR 42.2 and his judgement. Some number of Administrative Contracting Officers (ACO) and/or Contracting Officer Representatives (COR) will have to be appointed to report to the CO on the contractor's performance. The primary difference between the ACO and COR is that the ACO can modify the contract, whereas the COR cannot. It should be noted that the Army has very few Administrative Contracting Officers (civilian or military), compared to the other services. The training and development of highly mobile ACO's, suitable for monitoring a contingency contract, should be undertaken even before the actual award. Given the great distances between the CO's office and the place of contractor performance, there will be no suitable substitute for trained on-site ACO's. The need for a contract modification to adjust contract performance to more closely fit Army needs will occur despite any pre-award efforts to avoid this. The experience gained by both the Army and the contractor should be recorded and made part of the contract file. This information must be referred to when a new solicitation and statement of work is being prepared; otherwise, there is no learning process and the actual experiences will have been lost.

D. PREPARATION OF A SOW AND QA PLAN.

Even though contingency contracts are not subject to Office of Management Circular A-76 [63] reviews, the commercial nature of the services make the Circular, its supplement and the Office of Federal Procurement

Policy Pamphlet No. 4 [62] useful tools for developing the SOWs, Quality Assurance (QA) plans and cost comparisons. The following discussion will only highlight the contingency contracting issues and general requirements in view of the guidance available on these subjects. The most important requirement of any contract is to clearly communicate the Army's needs. This is done by preparing a SOW, the outline of which appears in Figure 7. The SOW performs the same function in a service contract that a specification does in a supply contract. That function is to accurately state the minimum requirements in such a manner that misunderstandings are precluded and competition maximized. When the Government and the contractor read the SOW, there must be only one reasonable interpretation. Anything less only encourages contractor claims or results in unsatisfactory performance.

The same is true of the QA surveillance plan that must accompany each SOW. As the title implies, the QA surveillance plan establishes the sampling/analysis required to determine if the contractor is in compliance with the SOW. Both the QA surveillance plan and it's field application must result in a fair appraisal of the quality received or the results may be legally indefensible.

1. Job Analysis

The writing of the SOW and the QA surveillance plan is accomplished by a systematic analysis of the required service. The procedure is referred to as job analysis. The analysis treats the functions or operation as a system consisting of jobs, or combination of jobs carried out by people and sometimes machines. If the system under review were a major system, consisting of smaller parts or subsystems, each of these could be broken

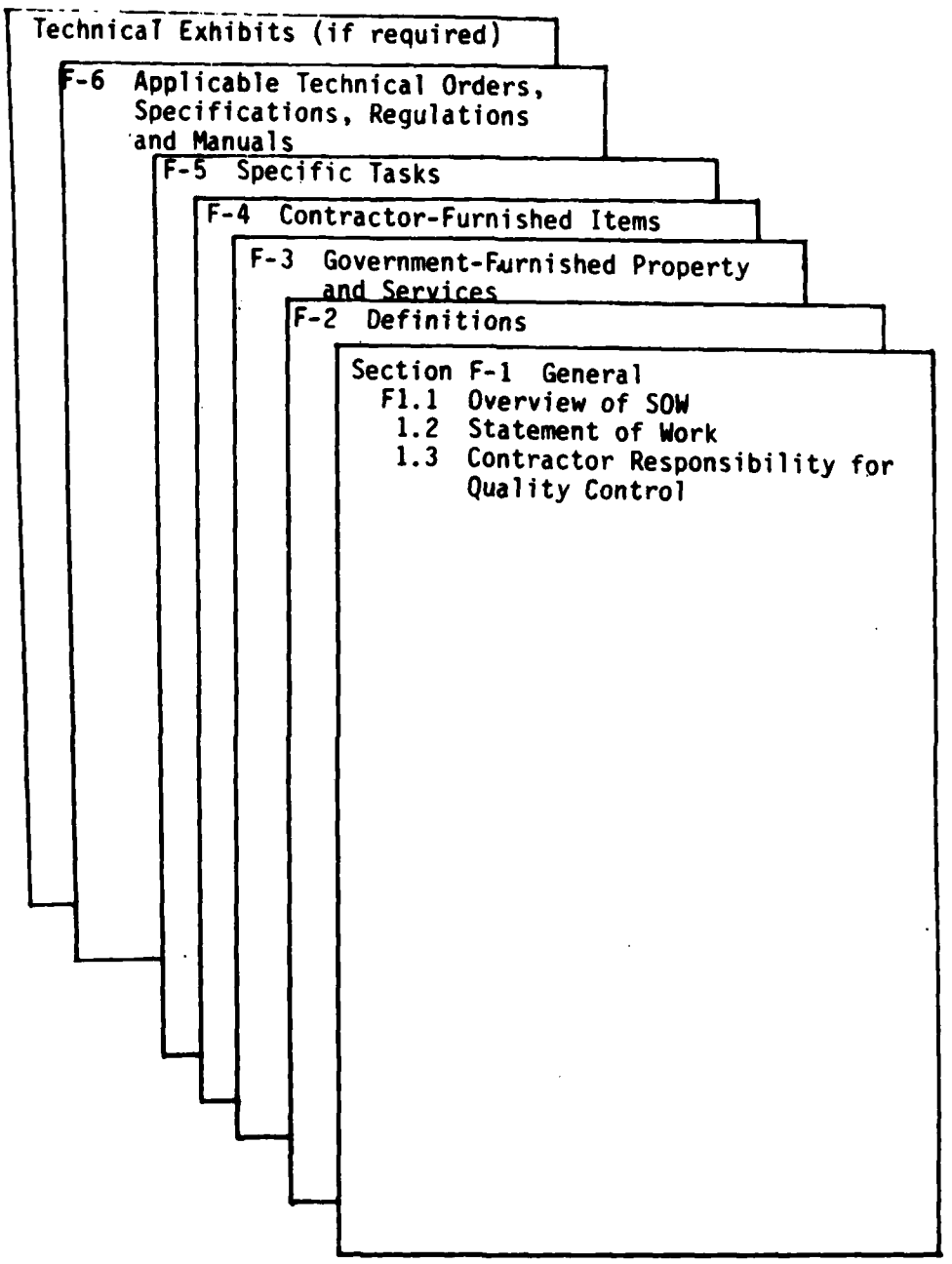


Figure 6: Statement of Work Outline

into smaller parts and they in turn broken into smaller ones. The purpose of this systematic approach is not a microscopic analysis, but the development of an enforceable SOW and matching surveillance plan.

This initial effort must be accomplished before attempting to write either the SOW or surveillance plan. Job analysis as described in OFPP Pamphlet 4 [62] consists of the following seven steps:

a. Analyze the current organization or requirement and identify the services to be provided.

b. Prepare a tree diagram with each part bringing about a final result or service.

c. Take each part of the tree diagram and break it into input, work and output.

d. Gather data on how much input is required to do the job and how much output is generated/provided.

e. Develop a performance value to be assigned for each service, which would result in an acceptable quality level.

f. Any applicable directives must be analyzed and minimized as much as possible.

g. A Government estimate of contractor cost is prepared for each specific service. In negotiations these figures are used to evaluate contractor proposals. After award, the estimates could be used as the basis for nonperformance deductions.

The job analysis process described above, while satisfactory for on-going commercial activities, is somewhat more complicated when applied to contingency contracting. In part, the complications stem from the following:

a. At present there are no military or civilian CSS organizations which are operating under conditions approaching those under which a contingency contractor might be required to perform.

b. Contingency contracting, by it's very nature, assumes that the working environment will not be in totally secure surroundings. Enemy activity could disrupt contractor performance at anytime.

c. The only written requirements the Army presently has are military missions, functions and doctrine for military CSS organizations. To ask a contractor to exactly duplicate those military CSS organizations and operations would be to deprive the contractor of his managerial incentive to seek organizational improvements. Military Tables of Organization and Equipment (TOE's) and procedures are not necessarily superior or equal to other structures or methods.

2. Identifying Key Performance Indicators

As previously stated, the SOW will influence what is put into the surveillance plan. Likewise, the surveillance plan will require that the SOW include either measurable outputs and/or procedures. Given the magnitude of the task of converting military support requirements to procedures, output measurements would be more suitable than procedure measurements. While some combination of measurements might be necessary when the contractor interfaces directly with a military unit, procedure measurements should normally be limited to areas of obvious need like the completion of transportation documents, fire/safety precautions, and similar needs. The use of fire/safety procedures would be particularly suitable for those contractors required to handle ammunition and fuels.

The advantages of writing the SOW and surveillance plan based on output

measurements are:

a. Output measurements focus attention on performance, the one thing that counts in contingency contracting.

b. Contractors who want to compete for a contingency contract would find performance measurements consistent with their own civilian management thinking. Prices quoted on performance measurements should be closer to market prices, while requirements to adhere to Government procedures will likely have an upward impact on costs.

c. The number of Government contract administrators necessary to monitor the prime contractor would be reduced if the standards of acceptance were performance-oriented.

d. Contractor development of the documentation necessary to establish that government procedures were being adhered to would be reduced. The effort saved could be directed towards performance or cost reduction.

Without performance standards or standards relatable to the actual contract operations, the task of measuring the quality and quantity of the service provided becomes very subjective. In a dynamic environment, the goal should be to minimize the contract administration effort. As discussed in this section, the success of achieving that goal is a function of the thought and skill applied to the SOW and the supporting surveillance plans.

E. ASSURANCE OF PERFORMANCE.

1. Success through Selection

There is no single action or contract provision that will absolutely assure contract performance. The best that can be hoped for is that each party to the contingency contract will make an honest effort to (1)

identify known hindrances to performance and (2) resolve or plan to resolve those hindrances at some specific point. Reasonableness and good faith in negotiations will do more to assure performance of the contract than any quantity of penalty clauses. In fact, the "key" to success has more to do with the selection of the right contractor than anything else. A cooperative contractor would not require nearly as much supervision and would be less inclined to withhold information regarding potential performance problems.

In selecting a contingency contractor who can reasonably assure performance, all the following factors should be considered:

a. The scope of the contractor's current overseas operations, to include:

(1) location(s),

(2) equipment owned and leased at each location(s),

(3) personnel employed at each location, both American and foreign, and

(4) the length of time the contractor has been operating in each location.

b. The contractor's ability to expand his overseas operations to include:

(1) the time required to expand at each location,

(2) a list of potential subcontractors at each location, and

(3) the number of additional American managers and technicians available and/or the time needed to recruit.

c. The contractor's ability to obtain the necessary foreign legal and business clearances to expand his business operations.

d. The degree of foreign ownership in the corporation.

e. The willingness of management to avoid other contracts or legal entanglements that would conflict with fully supporting the contingency contract.

f. Contractor accounting system acceptable to the Government for purposes of supporting a cost-reimbursement contract.

g. Overseas management experience of assigned contract managers:

(1) the number of American managers that have worked overseas,

(2) the length of time they worked overseas,

(3) where they worked overseas, and

(4) types and scope of functions managed.

Consideration of these factors, as well as others, should result in the selection of the best contractor for the requirements. While none of these will preclude post award problems, the problems should be minimized. In any major military operation, problems can be avoided by careful planning, and the same is true of selecting a contractor. Care taken in the initial selection process will do more to assure performance than the application of penalties.

2. Use of Penalties

Once a contingency contract is activated and the contractor starts to mobilize and deploy his resources, there will undoubtedly be delays. Whether the delays are excusable or not, the delays will be a source of frustration to those relying on contractor support. The challenge will be to refrain from taking legal action against the contractor until the facts are known. The rush to prejudge the contractor will be sorely tempting, but in fairness to all concerned must be restrained. This restraint is

not out of deference to the contractor's problems, but rather as a matter of intelligent decision-making. If the contractor has an excusable delay or some form of impossibility prevents timely performance, any attempt to apply a contractual penalty would be both counterproductive and legally indefensible. When contract performance problems occur, the objective of the Government should be to maintain the maximum possible performance under the existing circumstances. Sometimes that may mean taking no immediate contractual action against the contractor, but rather allowing the contractor the time necessary to resolve the difficulties without waiving the Government's rights.

What is needed in our contingency contracting relationship is the same that is needed for any contractual relationship, a sense of fairness and balance in decision making. Figure 7 illustrates some of the penalties that the Government can use against the contractor but shows that such action may likely result in the contractor seeking remedies to offset his losses. The Government has no right to hold the contractor to a higher standard than is reasonable under the law. That is the reason the government and contractor courses of action are depicted on the scales of justice in the figure. As the following discussion of the Government's use of the default clause illustrates, the contractor is not defenseless.

Termination of a contract for default should be reserved for those cases where the Government can obtain some meaningful benefit or relief. Allowing slow performance with appropriate consideration is often more in the best interest of the Government than defaulting a contractor and adding to the court's litigation backlog. Default termination of a contract is the single most significant legal action that can be taken against

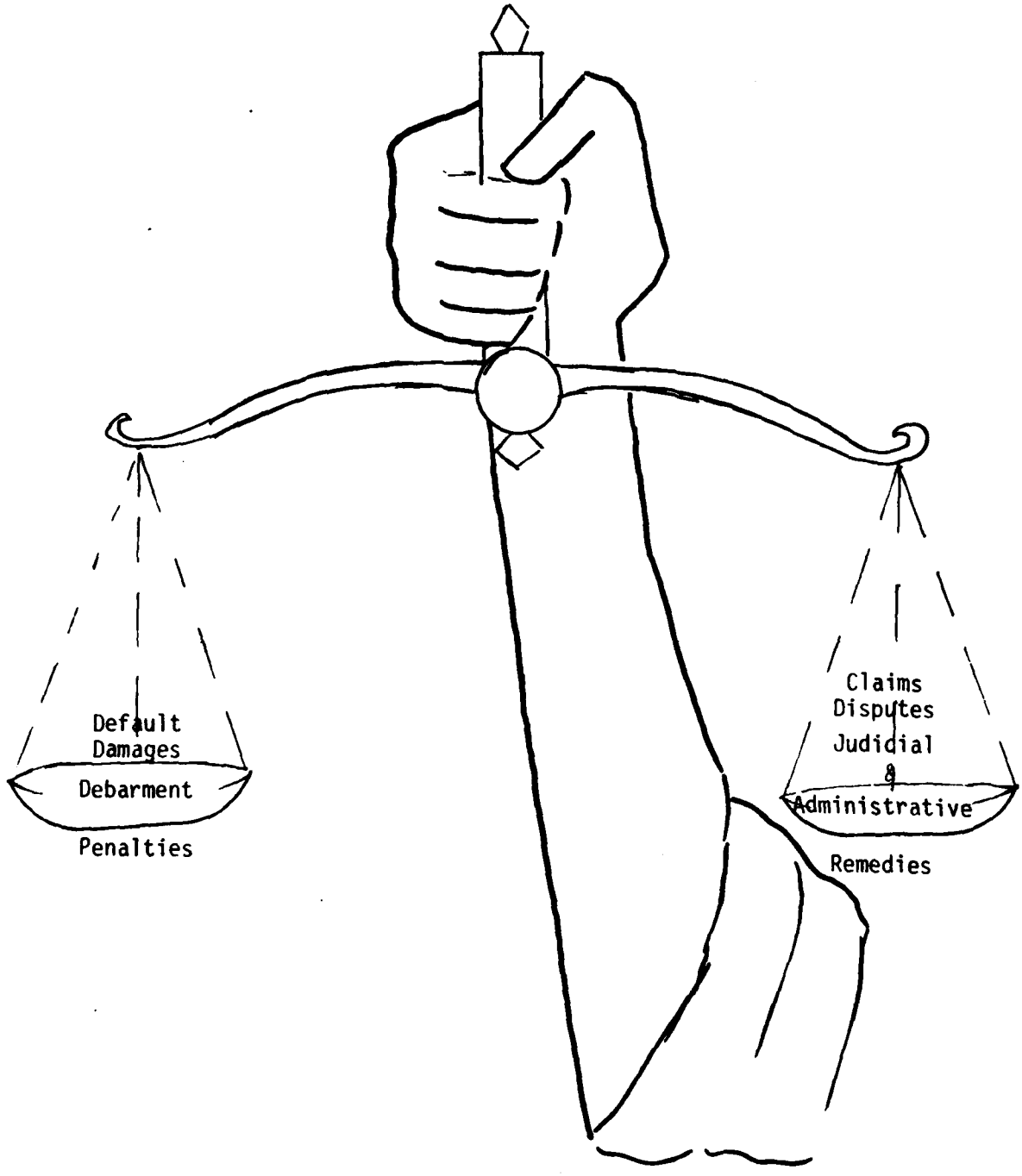


Figure 7: The Penalties - Remedies Balance

a contractor, but there are certain legal ramifications which could make its use ill-advised:

a. A defaulted contractor automatically loses his right to proceed under the contract and, unless another contractor is immediately available, all work will stop. If there are subcontractors, they will also stop work as the termination notices are passed down from the prime.

b. The various termination for default clauses found at FAR 52.249 [3] state in one form or another that: "...the contractor shall not be liable for any excess cost if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the contractor." The first two examples are (1) acts of the public enemy and (2) acts of the Government in either its sovereign or contractual capacity. In contingency contracting, either or both of these are likely to provide the contractor with a legal excuse for non-performance. But the latter excuse is particularly predictable, since the Army and the contractor will have to interface daily to get the job done. Therefore, if there is blame, there will likely be more than enough that can be attributed to Army personnel or actions to absolve the contractor.

c. Should the contractor dispute the decision to terminate for default and later obtain a favorable court decision, he can recover financially. If in the meantime the Government made a repurchase, the Government would be paying two contractors to get one job done.

d. Once the contractor is terminated for default he cannot be reinstated.

The considerations above do not include all possibilities but they do provide a sampling of the problems of using default as a tool to gain

contractor performance. Unless there is immediate repurchase, default gains the Government nothing, except the loss of whatever performance it was receiving. Experts know that few contracts are ever terminated for default in static peacetime situations even though many might be delinquent.

F. SPECIFIC CONTRACT CLAUSES/ISSUES.

Without completely restating the coverage provided in the FAR [3] or the DOD and Army Supplements [51; 10], the following references or topics are provided for the consideration of the planners, PCO's and functional specialists in determining how the contractor will be employed and the Army's responsibilities for successful or possible performance. Another source of information on how to structure the contract will be the offeror's request for clarification and various types of Government-furnished support. While reaction to receiving such a "conditional" proposal might be to reject it, the temptation should be resisted. Contingency contracting is both a new and unusual solution to an old problem of trying to minimize the use of Army resources for combat service support. It therefore follows that all offers, including those with a rather extensive list of conditions should be given reasonable consideration.

1. Contractor versus Government-Furnished Support

The following matrix, Table 4, is a projected list of conditions or requirements that an offeror may include in his offer. Each of these if accepted by the Government would have the effect of reducing contractor risk, while increasing the Government's potential responsibility for any failure to perform and the increased logistical cost. However, the alternative of leaving certain performance areas entirely up to the contractor

Subject/Topic	Impact if Contractor Request is approved by the Government	Impact if Request is Denied by the Government
Flight authorization for contractor personnel to fly in U.S. Military aircraft (Intertheater/ Intratheater)	Government obtains a reduction in contract price, but assumes liability for personnel being transported.	Contract price increased by contractor who must assume liability for his personnel. (May be impossible if war is declared.)
Military Furnished Sea Transport to area of operation.	"	"
Military provides shelter/billeting for contractor personnel	Government would be responsible for maintenance, lighting, heating, plumbing and security.	Contractor competes with military for available shelter or building materials.
Military provides rations/meals for contractor personnel	Ration demand would be increased. US rations may be unacceptable to foreign workers. Contract would have to address quality of ration to be provided and number of meals.	Contractor competes with civilian population for available food. Non-performance because of food related complications.
Military provides medical/dental treatment for contractor personnel	Increased demand for military medical /dental resources.	Contractor must include medical personnel on his staff or compete with civilian population for services.
Military to provide outer field clothing/ uniforms for contractor	Drain placed on clothing resources possibly needed by army units. Possible work stoppages avoided.	Possible contract price increased. Contractor competes for suitable clothing. Possible work stoppage if weather becomes severe.

TABLE 4: Support Matrix

Subject/Topic	Impact if contractor Request is approved by the Government	Impact if Request is Denied by the Government
Military to provide transportation to and from work site	Drain placed on military transportation resources. Possible work stoppage avoided.	Contractor may find public transport to be inadequate. Possible work stoppage if condition becomes severe.
Military to allow the contractor both access to the military communication network and the necessary equipment	Drain placed on military communication resources. Contractor can be reached immediately by military personnel. Contractor personnel must be trained on proper security and use of equipment.	Contractor develops or continues to use his own communication network which may not be compatible with the military.

TABLE 4: Support Matrix (Cont'd)

may be equally undesirable. It is therefore necessary that a policy be developed as to how much support the Army should be prepared to provide a contractor, who in turn will be directly supporting the deployed forces. The subject/topics listed in the matrix are by no means complete.

DOD policy has always held that the contractor is expected to provide his own equipment and materiels and not look to the Government as a substitute for the marketplace. Normally this policy serves the best interests of the Government and there is no need for deviations.

In preparing the solicitation, the Government is expected to list all the equipment it is prepared to furnish and the terms under which it will be furnished. Assuming the solicitation is one for negotiation, the contractor may respond with his own list of equipment he wants the Government to furnish. The difference, if any, must then be resolved before an award can be made. Obviously each piece of equipment the Government agrees to furnish increases probable Government responsibility for any failure to perform by the contractor.

The two primary contract provisions which influence contractor risk in using Government-furnished equipment (GFE) are FAR 52.245-2 for fixed price contracts and FAR 52.245-5 for cost-reimbursement contracts. The difference between the two in terms of financial risk is considerable. Under the fixed price clause the contractor is responsible for "... any loss or destruction of, or damage to, Government property..."; the only exception is reasonable wear and tear. This places the fixed-price contractor at such risk that he would be well advised to obtain considerable insurance coverage. However, just the reverse is true under cost-reimbursement contracts, where the contractor is not liable for loss or destruction of

Government property. Generally speaking, under cost-reimbursement contracts the Government must be satisfied with whatever reimbursement comes from the contractor's insurance company. There is no further liability unless the Governmemt can prove willful misconduct or lack of good faith on the part of the contractor's managers. This latter possibility of recovery is nearly impossible.

Some of the reasons given for the disparity between these two clauses include (1) adherence with common law bailment doctrine, and (2) the reduction of the Government's overall cost by accepting more risk. Whatever the reason, the Government will be assuming considerable risk in terms of property loss or damage because the contingency requirements make the use of a cost-reimbursement contract almost mandatory. However, if it takes this kind of risk acceptance by the Government to enhance the probability of success, it should be accepted.

2. War Risk

The risk that war poses to any commercial endeavor is considerable. In addition to the financial ruin that can occur from entering a fixed-price contract at peacetime prices, there is the loss of life and property that can occur from acts of the enemy. The risks imposed by acts of the enemy are collectively referred to as war risk.

In the case of war risk, as it relates to the contractor's employees, there are several applicable statutes: the Defense Base Act (42 USCA 1651) [64], Longshoreman's and Harbor Workers' Compensation Act (33 USCA 901) and War Hazards Compensation Act (42 USCA 1701)[65]. Each of these statutes has corresponding coverage in a FAR provision. (See discussion at FAR 28.2 and .3). These provisions generally require the contractor

(and subcontractors) to provide for workers' compensation insurance as required by the laws of the countries to which their workers are nationals. The effect of these provisions is to limit a contractor's liability for enemy acts as they relate to harming his employees. Accordingly the contingency contractor should not be unduly concerned with this element of his contract risk.

The personal property and equipment owned or leased by a contractor is, however, a different story. There are no known statutes which address the loss of such property as it relates to acts of war. Accordingly, custom and practice is for the contractor to seek insurance on the open market when operating in a war zone. Such insurance, if available, will often result in the payment of excessive premiums by peacetime standards. The cost of which will undoubtly be passed on to the Government. Should the Government not wish to pay such premiums, the alternative is for the Government to underwrite more of the risk. However, there are limitations to including provisions which increase the Government's unfunded liability in the opinion of the Comptroller General, notably the creation of anti-deficiency act violations.

The problem of war risk can best be resolved by the use of cost-reimbursement contracts which permit self-insurance arrangements and the payment of actual premium expenses. While not a cheap solution, there are no cheap solutions to insuring life or property in time of war.

Regardless of the level of logistic support the Government believes it can offer the contractor, the one thing the Government should not do in preparing the solicitation or conducting the negotiations is to convey false impressions. If there is a possibility that the contractor will be

required to create facilities from the ground up or to otherwise operate from austere conditions, these requirements should be stated. Any withholding of essential information, projections or even estimates on what the contractor could be confronted with, should not be condoned. The success of contingency contracting will depend very much on both the accuracy and honesty of negotiations.

3. Service Contract

Since the primary requirement in a contingency contract will be for services, the regulatory guidance in PART 37 of the FAR [3] and the Defense supplements [51; 10] will have to be considered in the contract formation and the proposed concept of contractor employment. Specific issues are:

a. Personal services contracts - If contractor personnel are used to fill out Army units and work under the supervision of Army personnel, the contract will be for personal services and require specific authorization. See FAR 37.104.

b. Contractor Personnel - the coverage at AFARS 37.7096 while directed to engineering and technical services is appropriate for the contingency contract as well. Topics covered include: (1) security clearances and identification cards; (2) accompanying dependents; (3) removal of contract personnel; and (4) authorized government services and facilities use by the contractor and contractor personnel.

c. Reimbursable and Nonreimbursable Costs - Definitions of reimbursable and nonreimbursable costs for several categories of costs should be provided for in the contract to assure both parties are aware of their obligations and liabilities. Typical costs that will be encountered in

contingency contracts and require definition by specific requirement are:

(1) Travel and Transportation

(a) Initial and terminal travel to and from work site

(b) Applicable rates or guidelines for transportation and per diem costs

(c) Travel cost-reimbursement ceilings

(d) Causes for nonreimbursement of the above costs.

(2) Overtime

(a) Procedures for authorizing overtime

(b) Applicability of overtime

(c) Overtime Rates

(d) Overtime cost-reimbursement ceilings

(3) Leave and other absences

(a) Authorized leaves and absences

(b) Legal holidays - U.S. or other

(4) Differentials for Overseas/Hostile Area Service

(a) Applicable rates for service overseas and/or a hostile area

(b) Eligible contractor personnel

(5) Uniforms

(a) Special uniform, clothing or personal equipment requirements

(b) Issue and return procedures for GFE

(6) Decreased Personnel

(a) Disposition of deceased contractor personnel during peace or hostilities, CONUS or OCONUS

(b) Disposition of other than U. S. personnel

4. Contracting OCONUS

Additional requirements that occur with contract performance outside the U. S. are:

a. Balance of Payments Program

The majority of costs for a contingency contract will be incurred for services rendered OCONUS. Therefore, the Balance of Payment Program may apply depending on the specific requirement. The solicitation and evaluation procedures and the use of excess and near-excess foreign currencies are discussed in FAR 25.3.

b. Transportation Sources

Preferences for use of U. S. Flag carriers, both air and ocean transportation, by the Federal Government also applies to its contractors. Considering the potential requirements for contractor movement of personnel and cargo by either mode, the CO must assure the requirements set forth at FAR 47.4 and 47.5 are included in the contingency contract and the Army has procedures for reviewing the contractor's use of transportation to assure his compliance.

5. Contractor Employees with Ready Reserve Commitments

To prevent any impact on the contractor's operation during mobilization, the contractor must be required to screen his employees for Ready Reserve commitments. Since no deferments, delays, or exemptions from obligation will be granted to Ready Reservists due to civilian employment [56], the contractor must be prepared to replace those individuals or require their removal from the Ready Reserve. While current laws only encourage nonfederal employer's to adopt this personnel management procedure, [56] the obvious conflict between manpower needs of the civilian

defense support effort and the military during mobilization make screening procedures a mandatory issue in contingency contracts.

6. Contractor Employee Discipline

The contractor will have to provide in his planning for the means of ensuring the discipline of his employees. Unless a war is declared, the military commander will not be able to enforce any type of discipline short of requiring the PCO to have the contractor remove specific personnel from the theater. The only other source of law and order would depend upon the agreements between the US and the host nation and the contractor's defined status. The contractor and his personnel should also be made aware that at a minimum the US personnel will be subject to the Uniform Code of Military Justice (UCMJ) [66] in the event of a declared war per Article 2, UCMJ.

7. Waivers and Approvals

While it would be difficult to enumerate the numerous types and levels of approval the CO will have to seek for any given contingency contract, it is possible to propose a simple approach to the requirement. Due to the cost structure of the contingency contract (i.e., largely dormant except for the planning and management effort) most of the dollar threshold requirements for approvals in the FAR and its supplements would not be broached until mobilization. The same is true for most waivers and deviations from FAR requirements; they would not be required unless the mobilization/operation phase of the contract is activated. Since it cannot be assumed a war will be declared and the FAR will be set aside due to the exigency, the CO should seek all approvals at the highest level required based on the estimated total cost and/or operational requirements. This

approach may entail more work initially, but will pay dividends if and when the full operation is mobilized by assuring the leadership has been provided with the full scope of contingency contracts from the outset.

G. SUMMARY.

Contingency contracts will be unique contracts in many respects for both the Government and the contractor. While the discussion may have been rather basic on some points, it illustrates that, unique or not, the contingency contract is still a Government contract subject to the same requirements to be a legal contract as any other. Meeting the objectives of a well written solicitation and a sound contract requires planning; a comprehensive analysis and statement of the tasks required, to include the means to evaluate the contractor's performance; a fair evaluation of the proposals and the Army's preparation to administer the awarded contract. The key word is planning. Just as it is necessary for military operations, it must be done for acquisition to assure the objectives are met.

CHAPTER V

ACQUISITION STAFFING REQUIREMENTS

A. INTRODUCTION.

Short of a declared war, the Army acquisition of goods and services will be accomplished in accordance with the acquisition regulations. Even a declared war will only suspend those regulatory requirements for maximizing competition. In that context, there are no streamlined procedures applicable to only contingency contracts awarded in peacetime CONUS for planning and wartime execution OCONUS. These contracts require the same sound acquisition planning and administration as any contract.

The real requirement for successful accomplishment of the peacetime contingency contracting functions as well as the local procurement function in the theater of operation is trained personnel in adequate numbers for the anticipated level of acquisition activity. This chapter will discuss those staffing and training requirements and other requirements to support the contracting functions.

B. DA STAFFING FOR CONTINGENCY CONTRACTING.

The Army has established a mode of contracting support for its combat units that will not accommodate either facet of contingency contracting, that is, preplanned contracts and contracting during a contingency. Most Army retail procurement support is provided by totally or predominantly civilian-manned Table of Distribution and Allowances (TDA) activities. Most "qualified" military procurement officers are field grade officers trained in major weapon system acquisition and with little actual experience in procurement compared to their civilian counterparts. In order for

the Army to accomplish the LOGCAP and contingency operation support missions, the Army must reconsider how it is organized for both functions.

1. Preplanned LOGCAP Contracting

The LOGCAP task of acquiring and administering a contract(s) to perform planning and management functions for providing required support services at some future date was found to be beyond the contracting capability of HQs, Third United States Army (TUSA). If TUSA is representative of the other Army component HQs, the finding is equally applicable. The TUSA contracting activity was never designed to handle contracts of the potential magnitude of the LOGCAP contracts. At the same time, the supporting procurement activities from US Forces Command (FORSCOM) are not staffed to assume the responsibility or provide support OCONUS if need be.

Since the contracting effort will be similar for each operation plan supported by LOGCAP, one method of meeting the challenge is to establish a LOGCAP program manager (PM). The PM's office (PMO) would be a contracting activity performing all Army LOGCAP contracting in addition to providing DA level visibility of the LOGCAP implementation worldwide. The LOGCAP PMO would act as the contracting office for all contracts and assign the administrative contracting function to the requiring activity. This would consolidate the contracting function and develop a cadre with expertise in this type of contracting while allowing the requirer to control the contract performance.

The size of the PMO would depend on the number of LOGCAP contracts, their scope and the rapidity with which they are desired. If the PMO is collocated with a command such as the Army Materiel Command (AMC), which could provide administrative support and some functional support, (e.g.,

legal counsel), the size of the PMO could be reduced. The only other alternative is to provide commensurate staffing to each MACOM with LOGCAP requirements.

2. Contingency Operation Contract Support

Army doctrine is replete with references to the need for contracting support in the area of responsibility (AOR) of a contingency operation. Examples are the supply support activity supporting organizational maintenance operations through local procurement of supplies or selected maintenance services per FM 29-2; and according to FM 54-9, local procurement will be used at the Corps Support Command (COSCOM) level to fill supply and maintenance requirements. These tasks are in addition to the necessary staffing in the AOR to administer any activated LOGCAP contracts.

While Army doctrine advocates the use of local procurement, the staffing of contracting activities to perform the task appears to belie the seriousness of the Army's intent. Except for the Corps of Engineer and special transportation contract supervision detachments [47], the only TOE units with identified procurement officers are:

a. Theater Army Area Command (TAACOM) - Headquarters and headquarters Company (HHC), Procurement - Disposal Branch: 1 Major (MAJ) and Captain (CPT).

b. TAACOM - Material Management Center (MMC), Procurement Branch: 1 MAJ and 2 Procurement NCO's.

c. Area Support Group, HHC, Material Directorate: 1 CPT

d. COSCOM, HHC, Procurement Branch: 1 LTC, 1 MAJ, 3 NCO's and 1 specialist

e. COSCOM, MMC, Procurement Branch: 1 MAJ, 2 NCOs.

Two considerations must be made of the above data. First, there are no procurement skill identifiers for Army NCO's [27] or training in procurement currently provided in the Materiel Control and Accounting Specialist-76P, or Senior Supply Sergeant-76Z career management fields. Second, most TAACOM's are reserve organizations and the qualifications of the assigned personnel, if there are any, are questionable.

Contracting support, be it for local procurement or LOGCAP, is a force multiplier that deserves more attention. With qualified personnel in properly staffed activities, contracting can acquire support, material and services far in excess of the resources used. If the Army expects to do the level of local procurement its doctrine indicates, it needs to review the requirements versus the assets available to do the function.

C. PROCUREMENT TRAINING.

The requirements for a qualified procurement officer dictates attendance at certain procurement-related courses and duty in a procurement activity. Unfortunately, the skills acquired are generally at an AMC or Defense Contract Administration Services (DCAS) activity and do not prepare the officer, or procurement NCO if any exist, for the types of contracting that would be done in support of a contingency operation. The ideal place for such on-the-job training is in the post purchasing office as a functioning contracting officer and not as the chief of the activity. To apply the skills learned, the officer must be assigned to a TOE unit with a procurement contingency mission while working in the TDA office.

Similar training requirements also exist for the aforementioned NCOs and any military personnel who will or may be assigned as administrative contracting officers (ACO), contracting officer representatives (COR), or

ordering officers. The level of training is generally less for the COR and ordering officers than an ACO or contracting officer but still essential. Bearing in mind, both the field commander and the contracting officer will be dependent upon the qualities and experience of the total contracting staff for effective contract management, training should be a priority issue for contingency operation preparedness. Many of the contractual problems encountered during Operation Urgent Fury are traceable to the late arrival in the theater, without reference material, of inexperienced contracting officers. [2]

The Grenada mission also illustrates the need to educate the combat commanders as to what procurement and the contracting officer can and cannot do. Many of the actions the COs were "asked" to ratify were questionable at best. Possibly the COs were only saved from the combat operator's wrath by the fact that their Head of Contracting Activity (HCA) was separate from the field command. In any case, a better understanding on the part of the combat commanders and their staffs of permissible procurements and expected standards of conduct for the requirer as well as the contracting activity would reduce the friction encountered in Grenada. [2]

D. SOURCE LISTS FOR CONTINGENCY OPERATION CONTRACTING.

Assuming there will be goods and services excess to a host nation's internal support needs, both civilian and military, or available from other nations whose proximity would decrease the Army's transportation burden, the CO should be encouraged to use those sources for contracting for supplies or services to support a contingency operation. However, short of using a commercial publication such as the yellow pages or its foreign equivalent, the CO will need a list of sources by commodity and

location. A data base of reliable commercial sources by commodities and capability will enable the CO to seek the best source(s) rather than the only immediately known source(s). Multiple sources, besides providing for some degree of competition if required, also provides redundancy should a requirement exceed a single contractor's capacity.

The Pacific Command (PACOM) has instituted an automated data base of the industrial and manufacturing capabilities of PACOM countries. The PACOM Contingency Acquisition Program (P-CAP) [4] is designed to provide US DOD contracting officers information on the availability and capability of reliable sources for materials in the PACOM AOR. The development of the data base has been limited to selected material classes by the necessity of negotiating the survey effort as well as the permissible degree and type of contracting with the individual countries. However, the P-CAP results to date prove that within the PACOM AOR there are adequate local or nearby sources to reduce the transportation requirements from CONUS, particularly for bulky construction and barrier materials.

The Central Command (CENTCOM) has established a similar program for its AOR. [69] Even though the commercial infrastructure problems in Southwest Asia and the resulting Geneva considerations may lower the potential for their AOR, the availability of such data bases will prove to be beneficial when combat material requirements must be met.

E. CONTINGENCY CONTRACTING KITS.

When a CO prepares to write a contractual document, he normally has the tools of his profession available. These generally consist of reference material, various forms, drawings and/or specifications, and access to other support personnel. In a contingency operation, the PCO will have

only what he brings with him. For that reason, the Army needs to develop a contingency contracting kit.

The kit should be a mandatory requirement for every contracting activity with a contingency operation support mission. The exact content of the kit should be tailored to the mission and the deployment location, and should be reviewed whenever the mission is revised or changed. The following should be considered for inclusion in the kit:

1. References
    a. Appropriate FAR Parts/Subparts and supplements
    b. MACOM Directives
    c. Unit/Activity Procedures
    d. Sample contract formats
    e. Instructions for contacting the cognizant HCA for the area of deployment
    f. Copy of CO's warrant
    g. Obligation authority forms from Finance and Accounting Officer
2. 90 day supply of Contract and Cash Control Forms
    a. DD Form 1155, Order for Supplies or Services
    b. SF 36, Continuation Sheet
    c. SF 30, Amendment of Solicitation/Modification of Contract
    d. SF 44, Purchase Order-Invoice/Voucher
    e. DD Form 1081, Statement of Agent Officer's Account
    f. DD Form 1131, Cash Collection Voucher
3. List of authorized Procurement Instrument Identification Numbers
4. Catalog(s) with pictures of supplies

5. Deployment site data

a. Known vendors

b. Local telephone books

c. Maps

6. Administrative Supplies

a. Office supplies

b. Contract file folders

c. Calculators

7. Currency Supply and Information

a. Cash and US Treasury Checks (amounts to be determined by mission)

b. List of banking facilities where US cash and checks can be exchanged for local currency

c. Cash box

d. Side arm to safeguard funds

Utilizing a kit developed for a particular contingency site, an experienced PCO with some prior knowledge of the potential requirements, sources, in-country procedures and the site would be able to provide operational support upon arrival in theater.

F. SUMMARY.

There are no magical means of acquiring the goods and services necessary to support the Army, be it for peacetime or contingency operations. The only efficient and effective way to accomplish the acquisition task is to assign the responsibility to an organization(s) staffed with trained personnel, and working for commanders who understand what the acquisition process is and their role in it. If those requirements are fulfilled and coupled

with the types of support tools discussed, the Army will be better prepared to meet the challenges of a contingency operation.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

A. GENERAL.

LOGCAP, like HNS, is a viable approach to meeting the Army's support shortfalls. By employing proper acquisition procedures, using detailed planning, applying sufficient priority and resources, and selecting a qualified and cooperative contractor, the Army can be reasonably assured of adequate performance by a contractor. If the Army acquisition effort neglects any of these prerequisites for successful contracting, LOGCAP will bear the bitter fruits of frustrated performance and expectations. Unfortunately, those results would be experienced in the crucible of supporting combat, a most unlikely time and environment to correct mistakes. The application of forethought and priority attention in the development and continuation of acquisition programs to support LOGCAP are simple but effective means to avoid later support problems.

B. CONCLUSIONS.

1. While LOGCAP contracts will be both difficult to contract for and administer, with sufficient planning and resources the task is manageable. However, the current level of priority being given to LOGCAP predicates a lengthy acquisition process.

2. Two major problems which must be addressed before the LOGCAP acquisition process can realistically continue are:

a. The effects of current or future international agreements on contractor operations.

b. The level of logistic support the Army is prepared to provide the contractor.

3. There are no streamlined procedures or shortcuts that apply to contingency contracting. Unless a war is declared, the CO will still be responsible for conducting his acquisitions in accordance with regulations using sound business sense.

4. The need for contract administration for LOGCAP contracts as well as local procurement in the AOR will require more qualified contracting officers and supporting ACOs and CORs than found in current TOEs.

5. The local procurement effort, and ACO and COR assignments will not require field grade contracting officers.

6. Qualified military personnel for LOGCAP acquisition require actual contracting experience at the post support level in addition to schooling.

7. The P-CAP data base and similar programs, in addition to being tools for a contracting officer to find sources, are important in their capability to demonstrate to field commanders the contributions contracting can make in providing material and services while reducing the Army's internal logistics burdens (e.g., transportation).

8. A PMO for LOGCAP would provide a central authority for program management and contracting, and the continuity required to apply the lessons learned with each acquisition iteration for world-wide support.

C. RECOMMENDATIONS.

1. Recommend DA:

a. Provide appropriate priority to LOGCAP to assure its implementation and resourcing.

b. Evaluate the need for a LOGCAP PMO.

2. Recommend the Office of the Deputy Chief of Staff for Logistics:

a. Conduct a study of the manning requirements for contingency contracting functions to bring the resources in balance with the expected level of procurement activity.

b. Seek the implementation of the following changes in military personnel practices.

(1) Assign officers to the procurement career field earlier in their career to build the experience level required by the profession.

(2) Train and assign NCOs, using a skill identifier, to procurement activities.

(3) Develop a method to assign procurement officers to TDA procurement activities while retaining the officer/NCO in a TOE space for contingency operations.

c. Establish a program to coordinate, and potentially consolidate, the source list programs.

d. Establish policies for contingency operation contracting support to assure the support is timely and effective. The requirement to develop and maintain contingency contracting kits should be part of the policy.

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The Army's Logistic Civil Augmentation Program (LOGCAP) is designed to fill combat support and combat service support requirements for contingency operations by utilizing contractors. LOGCAP envisions the contract services being acquired on a contingent basis for contract performance in a hostile environment. The contractor ability to perform will depend on how well the contract is written, the severity of hostility experienced and the multi-faceted effects imposed by operations in the less developed areas of the

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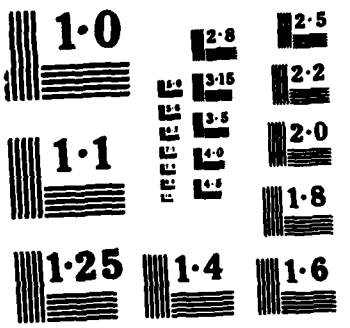

world. The Army must recognize its dependency on the contractor's ability to operate under these potentially severe conditions and plan for providing military and logistical support to the contractor similar to that provided Army support units. The Army must also provide for trained personnel, both acquisition and technical, to assure the Army and its contractors conduct themselves according to individual contract terms and conditions.

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